TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 209. 67.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED MAY 24, 1900.

(17,774.)

(17,774.)

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E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA, PLAINTIFF IN ERROR,

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THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1900.

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Transcript of Record.

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1898.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana, Plaintiff in Error,
vs.
THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO, Illinois, Defendant in Error.
No. 612.

Mr. D. A. Holmes, counsel for plaintiff in error.
Mr. John N. Jewett, counsel for defendant in error.

Error to the district court of the United States, northern district of Illinois, northern division.

Transcript of record filed June 22, 1899.
Printed record filed Aug. 19, 1899.
EDWARD M. HOLLOWAY, *Clerk.*

1 *Pleas.*

Pleas had at a regular term of the district court of the United States of America for the northern division of the northern district of Illinois, begun and held in the United States court-rooms, in the city of Chicago, in said division of said district, on the third Monday of December, it being the 19th day thereof, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-second year.

2 Present: The Honorable Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois; John C. Ames, United States marshal for said district, and T. C. MacMillan, clerk of said court.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY.
9141.

Be it remembered, that heretofore, to wit, on the 4th day of April, A. D. 1898, there was filed in the clerk's office of the district court of the United States, for the northern district of Illinois, a declaration, which said declaration is in the words and figures following, to wit:

Declaration. Filed April 4, 1898.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the District Court of the United States, Northern District of Illinois.

E. T. Wilson, receiver, plaintiff, by D. A. Holmes his attorney, complains of P. C. Peterson, a citizen of the State of Illinois, and The Merchants' Loan & Trust Company, a corporation created under and by virtue of the laws of the State of Illinois, and having its principal office at the city of Chicago, in said State, defendants, of a plea of debt:

For, that, whereas on and prior to the 4th day of September, 1896, the First National Bank of Helena, Montana, was a national banking corporation, organized under and by virtue of the laws of the United States, doing business at the city of Helena; and on the 4th day of September, 1896, being then insolvent, it suspended and ceased to do business; and on the 10th day of September, 1896, E. D. Edgerton was by the Honorable James H. Eckels, Comptroller of the Currency, duly appointed as receiver of the said bank and qualified as such; and on the 15th day of January, 1897, the said Edgerton having resigned as such receiver, one J. Sam. Brown was by the said Comptroller of the Currency appointed as the successor of the said *J. Sam. Brown* as receiver of the said bank, and qualified as such, and thereafter on the 9th day of November, 1897,

3 the commission of the said J. Sam. Brown as receiver of the said bank was revoked, and the plaintiff herein, E. T. Wilson, was appointed as his successor, and immediately thereupon duly qualified, and has ever since been acting as the receiver of the said bank, which said bank has since the 4th day of September, 1896, been and now is in the course of liquidation, and on the 11th day of October, 1897, upon an accounting by the receiver of the said The First National Bank of Helena, Montana, and a valuation of uncollected assets remaining in his hands, it was found necessary to enforce the liability of the stockholders in said bank; and the Honorable James H. Eckels, Comptroller of the Currency did thereupon make an assessment and requisition upon the shareholders of the said bank, and did demand of each and every one of them the payment of $100.00 upon each and every share of capital stock of said banking corporation held or owned by them respectively, and did direct the receiver of the said bank to take all necessary proceedings by suit or otherwise, to enforce the collection of the said assessment, which said assessment was by the said Comptroller of the Currency ordered to be paid on or before the 11th day of November, and

Whereas P. C. Peterson, one of the defendants herein appeared by the books of the said, The First National Bank of Helena, Montana, to be the owner and holder of one hundred and twenty (120) shares of stock in said bank, which said stock, however, was held by him

for the sole use and benefit of the defendant, The Merchants' Loan & Trust Company, which said Merchants' Loan & Trust Company is a banking institution, and the said P. C. Peterson being one of its employees.

By means whereof the defendants on the 11th day of November, 1897, became liable to pay to the receiver of the said The First National Bank of Helena, Montana, the sum of twelve thousand dollars ($12,000.00) being one hundred dollars ($100.00) upon each and every share of stock in said The First National Bank of Helena, held and owned by them.

Yet the defendants though often requested, and though the day of payment in the said order of the Comptroller of Currency levying assessment upon the stockholders of the said First National Bank of Helena, Montana, has elapsed have not paid to the plaintiff the said sum of twelve thousand dollars, or any part thereof, but refuse so to do, to the damage of the plaintiff of fifteen thousand dollars ($15,000.00).

And therefore he brings his suit, etc.

E. T. WILSON, *Receiver*,
By D. A. HOLMES, *His Att'y*.

4 Endorsed: 9141. District court United States. E. T. Wilson, receiver, *vs.* P. C. Peterson *et al.* Declaration. Filed April 4th, A. D. 1898. T. C. MacMillan, clerk. Mason, Holmes & Mason, attorneys for plaintiff.

And afterwards, to wit: on the 5th day of May, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable Peter S. Grosscup, judge, to wit:

Order of May 5, 1898, Dismissing as to Defendant P. C. Peterson.

E. T. WILSON, Receiver,
vs.
P. C. PETERSON, MERCHANTS' LOAN AND TRUST COMPANY. } 9141.

Comes the plaintiff by his attorney, and on his motion, it is ordered by the court that this cause be and the same is hereby dismissed as to the defendant P. C. Peterson.

And afterwards, to wit, on the 5th day of May, A. D. 1898, the following order was had and entered of record in said cause, before the Honorable Peter S. Grosscup, judge, to wit:

Order of May 5, 1898, Granting Leave to File Amended Declaration.

E. T. WILSON, Receiver,
vs.
MERCHANTS' LOAN AND TRUST COMPANY. } 9141.

Comes the plaintiff by his attorney, and on his motion, it is ordered by the court that the plaintiff be, and he is hereby given leave to file an amended declaration in this cause.

And afterwards, to wit: on the 5th day of May, A. D. 1898, an amended declaration was filed in the clerk's office of the district court of the United States for the northern district of Illinois, said amended declaration being in the words and figures following, to wit:

5 *Amended Declaration. Filed May* 5, 1898.

UNITED STATES OF AMERICA,
State of Illinois, Northern District.

In the District Court of the United States for the Northern District of Illinois.

E. T. WILSON, Receiver First National Bank of Helena, Montana,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY, a Corporation.

The plaintiff, by leave of court first had and obtained, amends his declaration heretofore filed herein, as follows, to wit:

E. T. Wilson, receiver of the First National Bank of Helena, Montana, a banking corporation, organized and doing business under the laws of the United States, plaintiff, by D. A. Holmes, his attorney, complains of The Merchants' Loan & Trust Company, a corporation, organized and doing business under the laws of the State of Illinois, defendant, of a plea that it render unto the plaintiff the sum of twelve thousand dollars ($12,000) which it owes and unjustly detains from the plaintiff.

And the plaintiff avers that on and prior to the 4th day of September, 1896, the First National Bank of Helena, Montana, was a banking corporation organized under and doing business by virtue of the laws of the United States, and on the said 4th day of September, 1896, it became and was insolvent, and suspended and ceased to do business, and that afterwards on the 10th day of September, 1896, E. D. Edgerton was duly appointed as receiver of said bank and qualified as such; and afterwards on the 15th day of January, 1897, the said Edgerton having resigned as such receiver, one J. Sam. Brown was, by the Comptroller of the Currency appointed as successor of the said Edgerton, and duly qualified as such receiver; and that afterwards on the 9th day of November, 1897, the commission of the said J. Sam. Brown, receiver as aforesaid, was revoked, and the plaintiff E. T. Wilson was duly appointed as his successor, and immediately qualified as such, and has ever since been acting as receiver of said bank; that on the 11th day of October, 1897, upon an accounting by the receiver of the said First National Bank of Helena, Montana, and a valuation of the uncollected assets of
6 the said bank, it was found necessary to enforce the liability of the stockholders in said bank, and the Honorable James H. Eckels, the then Comptroller of the Currency, did thereupon make an assessment and requisition upon the shareholders of the said bank at the time of its suspension of business, and did demand of each and every one of the shareholders as aforesaid, the payment

of the sum of one hundred dollars upon each and every share of capital stock of the said bank, held or owned by them respectively, such payment to be made on or before November 11th, 1897, and did direct the receiver of said bank, and his successor in office to take all necessary proceedings by suit or otherwise to enforce the collection of said assessment.

And the plaintiff further avers that the Merchants' Loan & Trust Company, a corporation, at some time between the 1st day of December, 1894, and the 1st day of June, 1895, (the exact date being to plaintiff unknown), purchased and became the owner of 120 shares of the capital stock of said First National Bank of Helena, Montana, of the par value of one hundred dollars each, and continued to be and was at the time said bank suspended and ceased to do business the real owner of the same. But in order to evade the responsibility imposed by law upon the shareholders in said bank, caused said shares to be placed on the books of said bank in the name of P. C. Peterson, one of its employees, in whose name said shares appeared on the said books at the time of said failure. And the plaintiff avers that the said Peterson was at the time said stock was issued to him as aforesaid, and at the time of the failure of said bank, a person of small means and not responsible financially.

By means whereof and by force of the laws of the United States, the said The Merchants' Loan & Trust Company, a corporation, became liable to pay to the plaintiff the amount of the said assessment and requisition upon it as aforesaid, being the sum of twelve thousand dollars ($12,000.00), said amount being one hundred dollars ($100.00) on each and every share of the capital stock of the said First National Bank of Helena, Montana, owned by it as aforesaid.

Yet the defendant, though often requested, has not paid the said sum of money so due it as aforesaid, or any part thereof, but so to do has wholly refused, and still does refuse, to the damage of the plaintiff of fifteen thousand dollars.

And therefore he brings his suit, etc.

E. T. WILSON, *Receiver*,
By D. A. HOLMES,
His Attorney.

7 Endorsed: No. 9141. United States of America, State of Illinois, northern district. In the district court. Amended declaration. E. T. Wilson, receiver, *vs.* Merchants' Loan & Trust Co. Filed May 5th, 1898. T. C. MacMillan, clerk. D. A. Holmes, att'y for receiver.

And afterwards, to wit, on the 5th day of May, A. D. 1898, the pleas of the Merchants' Loan & Trust Company were filed in the clerk's office of the U. S. dist. court for the northern dist. of Ill., said pleas being in the words and figures following, to wit:

Pleas of Merchants' Loan and Trust Company. Filed May 5, 1898.

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the District Court of the United States in and for the said District.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY. } Debt.

And the said defendant, The Merchants' Loan and Trust Company, by John N. Jewett, its attorney, comes and defends the wrong and injury, when &c., and says, that it does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said defendant hath above thereof in his said amended declaration, complained against it, and of this the said defendant puts itself upon the country, &c.

And for a further plea in this behalf, the said defendant says, that the said plaintiff ought not by reason of anything in said amended declaration contained, to have or maintain his aforesaid action thereof against it, because it says that it did not, at any time between the first day of December, 1894, and the first day of June, 1895, or at any other time, purchase or become the owner of one hundred and twenty (120) shares of the capital stock of the said First National Bank of Helena, Montana, or any share or shares of the capital stock of said bank, and of this the said defendant puts itself upon the country, &c.

And for a further plea in this behalf the said defendant says *actio non*, because it says that the said one hundred and twenty (120) shares of the capital stock of the said First National Bank of Helena, Montana, are and all times when &c. have been held by and in the name of the said P. C. Peterson, in the said amended declaration mentioned, as trustee and as security for the payment of the principal and interest of a certain promissory note, bearing date the 15th day of April, A. D. 1893, for the principal sum of twelve thousand dollars ($12,000) and payable to the order of the said defendant, The Merchants' Loan and Trust Company, on the sixteenth day of August, after the date thereof made and executed for value received, by one Shirley C. Ashby to the said defendant, and bearing interest at the rate of seven per cent. per annum after maturity.

And the said defendant avers that the said promissory note has ever since the execution thereof as aforesaid, been held and owned and still is held and owned by the said defendant, and except as to the sum of sixteen hundred and eighty dollars ($1,680) paid thereon on to wit: the 12th day of December, A. D. 1895, is now due and wholly unpaid. Wherefore it prays judgment, if the said plaintiff

ought to have or maintain his aforesaid action thereof against it, the said defendant.

JOHN N. JEWETT,
Att'y for Defendant.

JNO. N. JEWETT, *Of Counsel.*

Endorsed: No. 9141. In the United States district court for the northern district of Illinois. E. F. Wilson, receiver, &c., *vs.* The Merchants' Loan and Trust Company. Pleas. Filed May 5th, 1898. T. C. McMillan, clerk. Jno. N. Jewett, att'y & of counsel for def't.

And afterwards, to wit: on the 2d day of November, A. D. 1898, a statement of facts was filed in the clerk's office of the district court of the United States for the northern district of Illinois.

Statement of Facts, Filed Nov. 2, 1898, Set Out in Bill of Exceptions.

(Statement of facts was allowed as bill of exceptions on May 13th, 1899, and will be set out hereafter under that date, as bill of exceptions.)

9 And afterwards, to wit, on the 11th day of November, A. D. 1898, the replication of E. T. Wilson, receiver, was filed in the clerk's office of the district court of the United States for the northern district of Illinois, said replication being in the words and figures following, to wit:

Replication of E. T. Wilson. Filed Nov. 11, 1898.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the District Court of the United States for the Northern District of Illinois.

E. T. WILSON, Receiver, etc., }
vs. } 9141.
THE MERCHANTS' LOAN AND TRUST COMPANY. }

And the said plaintiff, by his attorney, as to the first and second pleas filed by the said defendant in which the said defendant puts itself upon the country, comes and does the like.

And the plaintiff says that he ought not to be barred from having and maintaining his cause of action in his said declaration set out by reason of anything in the defendant's third plea pleaded, because he says that the said 120 shares of capital stock of First National Bank of Helena, Montana, in the defendant's said plea mentioned *was* not held by the said P. C. Peterson as security for the payment of the principal and interest of the said promissory note in the defendant's said plea set out, but that the said defendant was and still is the real owner of said stock, and of this he puts himself upon the country.

D. A. HOLMES,
Attorney for Plaintiff.

Endorsed: 9141. In the district court of the United States. E. T. Wilson, receiver, *vs.* The Merchants' Loan & Trust Company. Replication. Filed Nov. 11th, 1898. T. C. MacMillan, clerk. Mason, Holmes & Mason, attorneys & counsellors at law, Home Insurance building, 205 La Salle St., Chicago. Telephone, main, 4283. Suite 513.

10 And afterwards, to wit, on the 18th day of April, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, judge, to wit:

Order of April 18, 1899, *Granting Leave to Change Stipulation.*

E. T. WILSON
vs.
MERCHANTS' LOAN AND TRUST COMPANY. } 9141.

On motion, leave is given to change the stipulation of parties herein by expunging the name of Lester S. Grosscup.

And afterwards, to wit, on the 18th day of April, A. D. 1899, the following order was had and entered of record in said cause, before the Honorable Christian C. Kohlsaat, judge, to wit:

Judgment, April 18, 1899.

E. T. WILSON, Receiver of First National Bank of Helena,
vs.
F. C. PETERSON, MERCHANTS' LOAN AND TRUST COMPANY. } 9141.

Now come the parties by their attorneys and thereupon a jury is waived by written stipulation and this cause is submitted to the court for trial, and the court having heard the evidence and arguments of counsel, and being now fully advised finds the issues for the defendant- to which finding the plaintiff excepts and thereupon the plaintiff enters his motion for a new trial which is heard and overruled, to which ruling the plaintiff excepts. It is thereupon considered and adjudged by the court that the defendants recover of the plaintiff their costs in this behalf to be taxed and that execution issue therefor to which judgment the plaintiff then and there excepts.

And afterwards, to wit, on the 18th day of April, A. D. 1899, a motion for a new trial of this cause was filed in the clerk's office of the district court of the United States for the northern district of Illinois, said motion for a new trial being in the words and figures following, to wit:

11 *Motion for New Trial. Filed April* 18, 1899.

In the District Court of the United States for the Northern District of Illinois, Northern Division.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana,
vs.
THE MERCHANTS' LOAN AND TRUST COMPANY. } At Law.

Motion for a new trial.

Comes now the plaintiff and moves the court to set aside the findings of the court and grant a new trial herein for the following reason, namely:

The court erred in finding the issues in favor of the defendant and against the plaintiff.

D. A. HOLMES,
Attorney for Plaintiff.

Endorsed: No. 9141. In the district court of the United States for the northern district of Illinois, northern division. E. T. Wilson, receiver of the First National Bank of Helena, Montana, *vs.* The Merchants' Loan & Trust Company. Motion for a new trial. Filed April 18, A. D. 1899. T. C. MacMillan, clerk. D. A. Holmes, attorney for plaintiff, 843–'6 Marquette bldg.

And afterwards, to wit: on the 13th day of May, A. D. 1899, the statement of facts filed in said court on November 2nd, 1898, was allowed as a bill of exceptions, which said bill of exceptions is in the words and figures following, to wit:

12 *Bill of Exceptions. Filed May* 13, 1899.

In the District Court of the United States for the Northern District of Illinois.

E. T. WILSON, Receiver of the First National Bank of Helena, Mont.,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY.

Statement of Facts. Filed Nov. 2, 1898.

Statement of facts.

On the 15th day of April, 1893, The Merchants' Loan and Trust Company, the defendant, loaned to Shirley C. Ashby, of Helena, Montana, twelve thousand dollars ($12,000.00) and took therefor his promissory note, in usual form, payable on the 16th day of August next following. As collateral security for the payment of said note

at maturity, Ashby assigned in blank and delivered to the defendant a certificate representing one hundred and fifty (150) shares of the capital stock of the Helena National Bank of Helena, Montana. The note taken for the loan was of the kind usually termed a collateral note, and authorized the sale of the collateral deposited as security therefor, upon default in the payment of the note. A copy of said note is hereto attached marked "Exhibit 1" and made a part of this statement.

At the time of the transaction above mentioned Ashby was president of the Helena national bank, which so far as known to the defendant was in good financial condition.

On the 26th day of July, 1893, Ashby made an assignment for the benefit of his creditors, to one Robert S. Ford of Grand Falls, Montana, and amongst the property assigned by him was the certificate for one hundred and fifty (150) shares of the capital stock of the Helena national bank, described as then held by the Merchants' Loan and Trust Company in pledge.

About the date of his assignment Ashby resigned the presidency of the Helena national bank and one E. D. Edgerton became president of the bank and subsequently acted as such. One Frank Baird was then cashier of the bank and so continued until the latter part of the summer of 1894, when he was succeeded by one George F. Cope, in that capacity.

Everything relating to the transaction remained in the situation above stated until the summer of 1894. The Ashby note was
13 wholly unpaid and the certificate of stock remained in the possession of the defendant, no transfer thereof being made upon the books of the bank. And on the 25th day of June, 1894, the defendant wrote a letter to Frank Baird, cashier of said Helena national bank, the original of which is hereto attached and marked "Exhibit A."

Some time in September or in the early part of October, 1894, the defendant received through the mail a printed circular letter relating to the affairs of the Helena national bank, signed "E. D. Edgerton, president" and dated at "Helena, Montana, September 5th, 1894." The document so received is hereto attached marked "Exhibit B," and made a part of this statement.

On October 15th, 1894, a letter was written by the then cashier of the defendant, and duly forwarded by mail to the cashier of the Helena national bank, a copy of which is hereto attached marked "Exhibtt C," is reply to which the cashier of the defendant received in due course of mail a letter dated at "Helena, Montana, Oct. 18th, 1894," signed E. D. Edgerton, president, the original of which as so received is hereto attached marked "Exhibit D." The statement referred to as enclosed in the letter is also attached as part of the last-named exhibit.

Later in the year 1894, it was proposed by the parties in interest at Helena, to consolidate the Helena national bank with the First National Bank of Helena, and a circular letter relating to such consolidation was sent to and received by the defendant, in reply to which and the letter enclosing the same, a letter was written by the

then vice-president of the defendant to George F. Cope, cashier, dated December 17th, 1894, a copy of which is hereto attached marked "Exhibit E," and by due course of mail a reply to said letter was *received* by the defendant addressed to its said vice-president, dated "Helena, Montana, Dec. 22, 1894" and signed "E. D. Edgerton, president of Helena national bank," which said reply is hereto attached marked "Exhibit F."

On December 26th and in response to the letter of Edgerton, president, of December 22nd, the vice-president of the defendant forwarded to him the certificate for one hundred and fifty (150) shares of the capital stock of the Helena national bank, enclosed in a letter of that date, a copy of which is hereto attached marked "Exhibit G," and by due course of mail a reply was received by the defendant dated December 31st, 1894, and signed "E. D. Edgerton, president, the Helena national bank" with the enclosure as therein stated, a copy of which is hereto attached marked "Exhibit H."

14 Subsequently and prior to April 22nd, 1895, the consolidation of the Helena national bank with the First National Bank of Helena was consummated with the consent and approval of the Comptroller of the Currency, Hon. James H. Eckles. The basis of the consolidation was an allowance to the stockholders in the Helena national bank of eighty per cent. of the face value of their stock in the stock of the consolidated bank, the name of the new or consolidated bank being "the First National Bank of Helena" and on or about May 17th, 1895, the certificates representing one hundred and fifty shares (150) of the capital stock of the Helena national bank standing in the name of P. C. Peterson were with the consent and under the direction of the defendant surrendered and new certificates representing one hundred and twenty (120) shares in the new or consolidated bank were issued to said Peterson in the place. The letter enclosing said certificates for exchange and containing the defendant's directions is hereto attached marked "Exhibit I." These last-named certificates have ever since been and now are in the possession and control of the defendant, and are held by it in the same way and for the same purpose as the certificates for one hundred and fifty (150) shares of the capital stock of the Helena national bank were originally held, except as the conditions may have been changed by the facts hereinbefore stated, but that neither the defendant nor the said Peterson ever took any part in the management of either of said banks or participated in the administration of their affairs.

On October 14, 1895, the 2nd vice-president of the defendant wrote and forwarded to Mr. Ford, the assignee of Shirley C. Ashby, a letter, a copy of which is hereto attached marked "Exhibit J," and in reply thereto received in due course of mail from said Ford, a letter which is hereto attached marked "Exhibit K." Afterwards the defendant received a letter from the said Ford bearing date January 4th, 1896, which letter is hereto attached marked "Exhibit L," to which letter the defendant replied under date of January 7th, 1896, a copy of which reply is hereto attached marked "Exhibit M."

All the communications between the defendant and said banks and

their officers in any manner relating to said stock and stock certificates since the certificates for one hundred and fifty shares of stock in the Helena national bank first came into the possession of the defendant in the manner and for the purposes herein stated, have been by correspondence, and the letters and documents hereinabove referred to and made exhibits hereto are an embodiment of all of that correspondence with said banks and their officers and with the assignee of said Shirley C. Ashby, so far as the same is material as evidence on the hearing of this cause. And the said exhibits are and each of them is hereby made a part of this statement.

The defendant is a corporation having banking and trust powers and is, and for many years last past has been engaged in the business of banking and in receiving and executing trusts in the city of Chicago in the State of Illinois. That P. C. Peterson is now and for several years has been a clerk in the banking office of defendant in charge of the foreign exchange department, in whose honesty and business integrity the managers of the defendant have had and still have every confidence. That said Peterson is dependent for the support of himself and family upon the salary paid him by defendant, and is without pecuniary responsibility. That in the course of its banking business, the defendant has in numerous instances received certificates of stock in other corporations, which were understood to be in good financial condition, as collateral security for loans of money made by it, said certificates being so assigned as to enable the defendant to control the disposition of the same for its own protection, and when, for any cause, it may have become necessary or advisable to change the registration of the shares of stock represented by said certificates upon the books of the companies issuing the same, it has been the custom of the defendant to have the same registered and the new certificates issued in the name of some confidential man in its employment, to be held by him subject to the order and direction of the defendant. And the shares of stock in the said Helena national bank represented by the certificate assigned and delivered to the defendant as collateral security, as hereinbefore recited, by said Shirley C. Ashby, were directed to be placed in the name of said Peterson, and the new certificates therefor issued to him in pursuance of that custom of the defendant. The reasons for this custom were various. Amongst them may be mentioned the fact that the certificates are more readily dealt with when so held; that the defendant as a banking corporation is unwilling to appear as a stockholder on the books of other corporations, and may not properly assume that position; that the holding of stock as collateral security is not in fact an ownership of it, and that in some cases there is a liability attached to an apparent nominal holding of stock.

The defendant is still the holder of the note of the said Shirley C. Ashby for $12,000.00, dated April 15th, 1893, upon which two partial payments only have been made, both by the assignee of said Ashby, as shown upon the back of said note hereto attached, viz: one for $1,680.00 made December 12th, 1895, and one for $960.00 made October 6th, 1896.

16 That on the 4th day of September, 1896, and during the times hereinafter mentioned, the said First National Bank of Helena, Montana, was a national banking corporation, doing business at the city of Helena, Montana, and on the said last-mentioned day it suspended and closed its doors; and on September 10th, 1896, E. D. Edgerton was duly appointed as receiver of said bank by the Comptroller of the Currency, and qualified as such.

On January 15th, 1897, said Edgerton having resigned, and J. Sam. Brown having been duly appointed to succeed said Edgerton as receiver of said bank, duly qualified as such.

On November 9th, 1897, the commission of the said J. Sam. Brown as receiver of said bank was revoked, and E. T. Wilson, the plaintiff herein, was duly appointed, and has ever since that time been the duly qualified and acting receiver of said bank.

That on the 11th day of October, 1897, the Comptroller of the Currency, having levied an assessment upon the stockholders of the First National Bank of Helena, of one hundred dollars ($100) a share, payable at the office of the receiver, on or before November 11, 1897, the receiver of said bank issued and mailed to each and all of the persons who appeared on the books of said bank—to be stockholders therein, a notice of such assessment in manner and form as required by law, and demanded payment of same. That a copy of said notice was duly received by P. C. Peterson at the office of the defendant, The Merchants' Loan & Trust Company, of which fact the defendant, The Merchants' Loan & Trust Company, was duly advised.

That before instituting this suit the plaintiff duly demanded of said Merchants' Loan & Trust Company and P. C. Peterson, payment of the sum of twelve thousand dollars ($12,000) being the amount due under said assessment upon the said stock, so held in the name of P. C. Peterson, which payment was refused and no part of the assessment has been paid.

The foregoing is a correct statement of the facts concerning the transactions on which the suit is based.

D. A. HOLMES,
Att'y for Pl'ff.
JNO. N. JEWETT,
Att'y for Def't.

Dated this 18th day of April, 1899.

17 EXHIBIT 1—NOTE OF SHIRLEY C. ASHBY.

"EXHIBIT 1."

Copy.

Int. paid. Aug. 16.

$12,000.00. CHICAGO, *Ap'l* 15, 1893.

August 16th, after date, I promise to pay to the order of the Merchants' Loan and Trust Co., of Chicago, at its office, twelve thousand dollars, for value received, with interest at the rate of seven per cent. per annum after due, having deposited with them as collateral security 150 shares Helena National Bank stock, and I hereby give

the said Merchants' Loan & Trust Co., of Chicago, its assign or assigns, authority to sell the same, or any part thereof, on the maturity of this note, or at any time thereafter, or before, in the event of the said securities depreciating in value, at public or private sale, without advertising the same, or demanding payment, or giving notice, and apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of the said stock, and in case the proceeds of the sale of the said stock shall not cover the principal, interest and expenses, I promise to pay the deficiency forthwith after such sale.

SHIRLEY C. ASHBY.

EXHIBIT A—LETTER OF JUNE 25, 1894.

"EXHIBIT A."

Incorporated 1857.

J. W. Doane, pres't. F. C. Osborn, cashier.
Orson Smith, V. pres't. F. N. Wilder, ass't cash'r.

Capital and surplus, $3,800,000.

The Merchants' Loan & Trust Co.

CHICAGO, *June 25th*, 1894.

Frank Baird, Esq., cashier, Helena, Mont.

DEAR SIR: As you are aware, we hold 150 shares of your bank stock as collateral security to a loan, and which we want to sell. We wrote you once before asking you for an offer, and we believe never received a reply. Now we want to sell this stock or any part of it if we can get a fair price for it, and we wish to offer it to you or to your board of directors first, and will thank you to make us an offer for it or any part of it. We do not want to put this stock in the hands of a broker, but we must do so if we cannot make a sale to some of the parties in your bank. An early reply will oblige,

Yours truly, F. C. OSBORN, *Cashier.*

18 EXHIBIT B—CIRCULAR LETTER SEPT. 5, 1894.

"EXHIBIT B."

Confidential.

HELENA, MONTANA, *September 5*, 1894.

——, ——.

DEAR SIR: I have received many inquiries relating to the bank, its proposed reduction of capital stock, its present condition and future prospects.

Permit me to say that while many of my answers have been brief, because of uncertainty on some points and want of time, I shall endeavor in this communication to go into details.

It is only proper that I should call your attention to the fact that this letter is personal, confidential and strictly private, as I have to go into certain details which should not be known to the public generally; first because they relate to your own internal affairs, which should always be carefully guarded; and second, because I make use of a certain comparative statement regarding other institutions, in order to explain the position of your own. Therefore, relying on your discretion and fairness, I unreservedly submit this communication.

I assumed the office of president on the 3rd of August, 1893. Since that time there has been an entire change of officers; the former officers being Mr. Frank Baird, cashier, Mr. A. B. Clements, vice-president; these have been succeeded by Mr. George F. Cope, formerly of the American national bank, as cashier, and Mr. C. K. Cole, formerly of the Second national bank, as vice-president.

You will remember that my predecessor, Mr. Ashby, made a voluntary assignment for the benefit of creditors the day following the closing of the two largest banks in our city; these banks represented fifty-nine per cent. of the capital and surplus of the six national banks then doing business in Helena.

Mr. Clements' retirement occurred at the January election and reorganization of the board, and really signified nothing.

Mr. Baird's resignation went into effect on the 15th of August, this year.

At this time it is not my intention, for want of space, to comment on any of these matters; but I enclose a clipping on the subject of Mr. Baird's retirement which is fully explanatory.

It is never a pleasant task to criticise a predecessor, but it is only fair and just to myself and the present officers of the bank to call your attention to the fact that of the one hundred thousand
19 dollars ($100,000) charged off, over one-half was the indebtedness of your former president, Mr. Ashby.

On the 1st of August, 1893, being two days after your former president had resigned, and two days previous to my election, the reserve of this bank, counting all its available assets of cash and exchange, was less than ten per cent., or to put it more clearly, its total individual and bank balances were, in round numbers, two hundred thousand dollars ($200,000), its cash and exchange about seventeen thousand dollars ($17,000).

Today the individual and bank balances are six hundred and eighty-two thousand three hundred and thirty dollars and six cents ($682,330.06); to meet which we have two hundred and twenty-four thousand sixty-three dollars and forty-seven cents ($224,063.47) in cash and exchange; making an available reserve of thirty-three per cent.

I call your attention to these conditions of the bank, both present and past, not egotistically, but rather as a matter of justification, to show you, more forcibly than any words I can command, that if you are not entirely satisfied with your investment in its stock—first, that I am not responsible, and second, that matters might have been a great deal worse.

In fact I believe I am justified in saying that if a change had not been made at or about the time it occurred by force of circumstances, the bank would necessarily have suspended; and, it is further my opinion, knowing the conditions of the country, the assets of the bank, and all the surrounding circumstances, that if it had been closed out by forced collections in the hands of a receiver, you gentlemen, as stockholders, would have received a comparative small percentage for your stock.

We consolidated with the Second national bank, of which I had been president ten years, and we are also winding up the business of the Montana savings bank.

It must be remembered that while these consolidations have added to our strength and brought us in a line of new business which will materially strengthen and aid us in earning money in the future, up to the present time they have really cost money; in other words, matters of that kind cannot be successfully carried through without some additional expense, and no immediate profit can be realized. Any practical banker will readily comprehend this.

August 1, 1893, our individual depositors numbered two hundred and twenty-seven (227). Today they number five hundred and forty-seven (547). This shows quite a handsome increase.

I submit herewith a comparative statement of the Helena banks, which, better than anything else, illustrates their conditions, and in this way only can I give you an intelligent idea of the true relative history and situation of your own institution.

From this statement you will see that during the past year we have increased our business nearly half a million. It is fair to say that, at this date, our business is nearly one hundred thousand dollars better than at the time we made our last report, July 18th. I want you to carefully consider this tabulated statement of general bank balances, which speaks volumes and is more potent than any other written language. These figures are taken from the sworn reports to the comptroller.

From it you will see that the city has five national banks, standing in point of volume of business in the following order: "First," "Merchants'," "Montana," "Helena" and "American."

From the statement you will observe that during a period extending from July, 1892, to July, this year, the general banking business of Helena has shrunk from a million and a half to two million dollars, out of a total of about ten million; distributed, generally speaking, about as follows: The First national, about a million dollars; the Montana national, three-quarters of a million dollars; the Merchants' national, one-quarter of a million dollars, while the Helena national shows an increase of over three hundred thousand dollars, and the American national about two hundred thousand dollars.

It should be remembered that Mr. Cope, our present cashier, was an officer, during this period, of the American national.

I do not wish you to understand that I am trying to depreciate the position of other banks, because they are all doing a good busi-

ness and are considered successful institutions. But, this shows the vast shrinkage of business we have gone through, and the comparatively excellent relative position which your own bank has sustained.

A meeting of the stockholders of this bank was called in June and adjourned until the 10th of August, at which time there was represented something over four thousand shares of stock, all of which, with the exception of ten shares, voted for the reduction of the capital stock to four hundred thousand dollars. The sum of the reduction (one hundred thousand dollars) we shall at once charge off to profit and loss, some of which, while slow, will be eventually collected.

My own judgment was to charge off two hundred thousand, and put one hundred thousand or one hundred and fifty thousand into surplus and undivided profit account, which would have decreased our taxes and been the proper thing to do; but there was a sufficient number of our stockholders who preferred one hundred thou-
21 sand dollars' reduction to make me think it wise to defer to their judgment; and consequently, while we had the power and could have done as we wished, we refrained from doing so in deference to their wishes.

In conclusion, I hope that you will appreciate the fact that a year's hard work has been put in; that in the exchange of cashiers I have made the best selection in my judgment, and, I think, in the opinion of the community, that could possibly have been made; we have a man over fifty years of age, who has spent his entire life in connection with the business interests of Montana, and who has been with a successful banking institution for the past five years; he is in every way capable and competent to discharge the active duties of cashier.

This was a matter in which it was impossible to consult the individual stockholders, and your directors, who have done everything in their power to aid the interests of this institution, were left to their individual and collective judgment.

Trusting that this statement will prove that my silence has not been unwarranted, and that in all respects we have been diligently working for the best results; and trusting, that if opportunity affords you will aid in securing additional depositors and friends, we will close this statement by requesting that if you, individually, or any of your friends or acquaintances, should pass through Helena, that you will make it a point to call and know us personally; and we also especially request that if opportunities for doing business throughout this part of the country present themselves, that effort be made to direct it to this institution. We shall be pleased to receive personal letters, and become more thoroughly in touch individually with each and all of you.

Before closing I ought to add that it will not be advisable for us to declare a dividend this year. The amount that our capital has been reduced just about offsets the dividends that have been paid you.

It is my purpose to make this bank strong and solvent, with a

reasonable surplus. This may not concur with all your wishes, but, if this plan had been adopted at the inception of the bank, instead of the foolish one of really declaring more dividends than the bank actually earned, we would all have been saved much trouble, expense and mortification.

As to the future policy and reasons therefor, I will be able to give you a more satisfactory conclusion about the first of the year. I think that the extra expense incident to the consolidation, advertising and restarting of the institution will have practically been spent by the end of the year, and that we will be able to make a very much better showing on earnings after that.

22 It is only fair to us to call your attention to the fact that here in Montana a very large percentage of the money we handle as deposits we have to pay interest on in some form.

Asking your patient indulgence and support in this matter, I respectfully submit the foregoing.

E. D. EDGERTON, *President.*

Comparative Statement of Helena Banks.

Date.	First.	Merchants'.	Montana.	Helena.	American.
July 12, 1892	$4,401,215.20	$2,393,000.77	$2,288,252.57	$953,717.45	$658,741.20
May 4, 1893	4,511,422.16	2,300,697.75	2,051,015.74	989,034.26	691,474.42
July 12, 1893	.....	2,158,509.85	1,964,846 63	880,709.31	657,084.66
Feb. 4, 1894	3,826,217.44	2,024,271.45	1,577,874.35	1,174,616.80	879,435.26
May 4, 1894	3,761,771.02	2,002,421.52	1,546,971.59	1,230,639.21	853,696.88
July 18, 1894	3,506,877.47	2,084,433.84	1,491,212.35	1,268,545.47	839,926.41
Decrease	$1,004,544.69	$308,566.93	$797,040.22	.....	.....
Increase	.....	.....	.....	$314,828.02	$181,185.21

24 EXHIBIT C—LETTER OF OCT. 15, 1894.

"EXHIBIT C."

Incorporated 1857.

Orson Smith, pres't; J. G. Orchard, cashier; E. D. Hulbert, vice-pres't; F. N. Wilder, ass't cashier.

Capital and surplus, $3,500,000.

The Merchants' Loan & Trust Company.

(Copy.)

CHICAGO, *Oct. 15th*, 1894.

Geo. C. Cope, Esq., cashier, Helena, Mont.

DEAR SIR: Your favor of the 5th inst. received enclosing the statement of your bank. We are glad to see that you are making some progress.

We have, as you are aware, 150 shares of the Helena National Bank stock and we wish to sell the same in amounts of 10 shares and upwards. Will you kindly inform us if you could get a customer for same and at what price? We would thank you for your prompt reply, and if unsuccessful through yourselves, we wish to offer the stock for sale in your city or in St. Paul.

Yours truly, F. C. OSBORN, *Cashier.*

25 EXHIBIT D—REPORT OF CASHIER OF HELENA NATIONAL BANK.

"EXHIBIT D."

No. 4406.

Report of the Condition of the Helena National Bank, at Helena, in the State of Montana, at the Close of Business, October 2, 1894.

Resources.

Loans and discounts		$881,880.94
Overdrafts, secured and unsecured		6,433.52
U. S. bonds to secure circulation		70,000.00
Premiums on U. S. bonds		6,400.00
Stock, securities, etc		6,957.06
Banking-house, furniture, and fixtures		14,034.41
Other real estate and mortgages owned		58,709.34
Due from national banks (not reserve agents)	$12,128.33	
Due from State banks and bankers	53,836.26	
Due from approved reserve agents	89,844.43	
Checks and other cash items	2,515.41	
Exchanges for clearing-house	4,068.04	
Notes of other national banks	20,380.00	
Fractional paper currency, nickels, and cents	124.80	

Lawful money reserve in bank, viz:		
Specie	61,031.50	
Legal-tender notes	55,700.00	
		299,628.77
Redemption fund with U. S. Treasurer (5 per cent. of circulation)		3,123.00
Total		$1,347,167.03

26 Liabilities.

Capital stock paid in		$500,000.00
Surplus fund		11,700.00
Undivided profits, less expenses and taxes paid		10,654.73
National bank notes outstanding		62,460.00
Due to other national banks	$34,511.52	
Due to State banks and bankers	75,393.14	
Dividends unpaid	785.00	
Individual deposits subject to check	318,790.11	
Demand certificates of deposit	101,000.00	
Time certificates of deposit	204,852.49	
Cashier's checks outstanding	10,020.04	
		745,352.30
Notes and bills rediscounted		3,000.00
Liabilities other than those above stated		14,000.00
Total		$1,347,167.03

STATE OF MONTANA, }
County of Lewis and Clarke, } ss:

I, George F. Cope, cashier of the above-named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

GEORGE F. COPE, *Cashier.*

Subscribed and sworn to before me this 4th day of October, 1894.

JOHN W. LUKE,
Notary Public.

[SEAL.]

Correct.
Attest:

E. D. EDGERTON.
J. B. SANFORD.
G. L. TRACEY.

27 EXHIBIT D—LETTER OF OCT. 18, 1894.

4406.

E. D. Edgerton, pres't; A. B. Clements, vice-pres't; Frank Baird, cashier; Jno. W. Luke, ass't cashier; Geo. F. Cope, cashier.

The Helena national bank.

Capital, $500,000.00.

HELENA, MONTANA, *Oct. 18th*, 1894.

F. C. Osborne, cashier Merchants' Loan & Trust Company, Chicago, Illinois.

DEAR SIR: Your letter to our Mr. Cope under date of Oct. 15th, received. From its contents, I think perhaps you did not receive our circular letter sent out some time since.

I think that your stock still stands in the name of Mr. Ashby; it was one of those matters which occurred before I came in here, and, until I saw your letter now the matter had entirely slipped my mind and I had forgotten that you were interested.

The West is slowly but very successfully recovering from the late uneasiness, but money is not plentiful by any manner of means. We have made a very handsome increase during the past year, and are laying the foundation, I think, for very successful operations. But, owing to the mismanagement of Mr. Ashby and former officers, we have had to charge off some paper, and in order to do this have reduced our capital stock one hundred thousand.

I do not believe that it would be possible to sell any stock at present. I think that more than likely in a year or so it can be disposed of at a fairly good figure. But just now it would be impossible to do anything with it, or any bank stock. All western banks, so far as has come under my observation, and I am interested in several institutions, are looked upon as far from desirable at the present time. This feeling of course must necessarily wear off, and the fact that representatives of some of the large concerns from the East are visiting Helena for the purpose of looking over the field as a place to loan money, tells me that confidence is slowly returning. Within the last half hour the representative of the Northwestern Life Insurance Company was talking with me; and within the last week the Mutual Benefit of New Jersey had a representative here. And, I might name others.

Hoping that the enclosed statement will be satisfactory I remain,

Yours truly, E. D. EDGERTON, *President.*

28 EXHIBIT E—LETTER OF DEC. 17, 1894.

"EXHIBIT E."

Incorporated 1857.

Orson Smith, pres't. J. G. Orchard, cashier.
E. D. Hulbert, vice-pres't. F. N. Wilder, ass't cashier.

Capital and surplus, $3,500,000.

The Merchants' Loan & Trust Company.

(Copy.)

CHICAGO, *Dec. 17th*, 1894.

Geo. F. Cope, Esq., cashier, Helena, Mont.

DEAR SIR: Your favor of the 13th inst. duly received. We will in future send all our collections to the First National Bank of Helena. Thanks for the printed circular regarding a consolidation of the Helena national bank with the First national. We would like to know how we stand in this matter. You know we hold 150 shares of the Helena National Bank stock as collateral to a note made by S. C. Ashby. What is necessary for us to do? How many shares of the First National Bank stock do we receive for the 150 shares of Helena national? Is there a market for the new stock? Please give us what information you can that we may proceed correctly, and oblige,

Yours truly, ORSON SMITH, *V. Pt.*

29 EXHIBIT F—LETTER OF DEC. 22, 1894.

"EXHIBIT F."

S. T. Hauser, pres't. Geo. F. Cope, cashier.
E. D. Edgerton, V. P. & manager. Geo. H. Hall, ass't cashier.

No. 1649.

First national bank.

Designated depository of the United States.

Capital and surplus, $1,000,000.

McM. HELENA, MONTANA, *Dec.* 22, 1894.

Orson Smith, vice-pres't Merchants' Loan & Trust Co., Chicago, Illinois.

DEAR SIR: Your favor of Dec. 17th to our Mr. Cope received. I never knew exactly how your matter with Mr. Ashby stood and I am pleased to have the information contained therein.

The new stock in the consolidated deal will be transferred on the same basis as held by the stockholders in the Helena national; but, it is only fair to call your attention to the fact that during the past three months the Comptroller of the Currency at our request, owing

to Mr. Ashby's peculiar methods and large indebtedness to the bank, has reduced the capital of the Helena national from $500,000 to $400,000. Consequently your 150 shares of the Helena national stock will be reissued to you in the same amount, less twenty per cent.

Inasmuch as we want to have matters as unanimous as possible, would it not be well for you to send in your stock and have it transferred to your own name, or, whatever name you may elect, and, send us your proxy to vote at the meeting in January regarding the consolidation?

We have considerably more than enough stock represented now to carry the matter, so you may know it is no selfish motive that prompts this suggestion, but rather for your own interest.

You understand Mr. Ashby is under an assignment, and, Lord know- what- not, and he has proven to be anything but a desirable party in *my* capacity of life that I know of.

30 You ask if there is a market for the new stock. I suppose you understand just how the West is at this time. We have no great amount of surplus money. I apprehend that there will be a market for the new stock, but just at the present time I don't know that I could refer you to any one. You understand that there are lots of western parties who would dispose of their western holdings at any price; and the truth is that the West is not quite able to take them all at once.

Any information that you may desire in the future I shall be most happy to supply if it is in my power.

Respectfully,

E. D. EDGERTON,
President of Helena Nat'l Bk.

EXHIBIT G—LETTER OF DEC. 26, 1894.

"EXHIBIT G."

Incorporated 1857.

Orson Smith, pres't. J. G. Orchard, cashier.
E. D. Hulbert, vice-pres't. F. N. Wilder, ass't cashier.

Capital and surplus, $3,500,000.

The Merchants' Loan & Trust Company.

(Copy.)

CHICAGO, *Dec. 26th*, 1894.

E. D. Edgerton, Esq., president Helena national bank, Helena, Mont.

DEAR SIR: I enclose herewith certificates of stock for 150 shares for which please send me two certificates of 50 shares each and one for 20 shares, in the name of P. C. Peterson. Mr. Peterson's address is care of this bank, and we will be very glad to furnish you with proxies if you will enclose us blanks for that purpose.

Where can Mr. Ashby be found? In a matter of this kind we would like very much to have him consent to our action.

Yours truly,

ORSON SMITH, *V. Pt.*

31 EXHIBIT H—LETTER OF DEC. 31, 1894.

"EXHIBIT H."

S. T. Hauser, president. Geo. F. Cope, cashier.
E. D. Edgerton, V. P. & manager. Geo. H. Hill, ass't cashier.

No. 1649.

First national bank.

Designated depository of the United States.

Capital and surplus, $1,000,000.

HELENA, MONTANA, *Dec.* 31, 1894.

Merchants' Loan & Trust Co., Chicago, Illinois.

GENTLEMEN: Yours of Dec. 26 received, with enclosure as stated. Agreeable to your instructions we have transferred the enclosed stock and return you herewith three certificates of the Helena National Bank stock, being numbered respectively 356–'7–'8, for fifty shares each, in the name of P. C. Peterson.

In your letter you instruct us to issue two fifty and one twenty certificates; undoubtedly this was under the assumption of the retirement of the one hundred thousand dollars I spoke of in my letter. While we have the order, we have never acted on it by making the formal change, inasmuch as about that time we arranged this consolidation and thought it useless to bother our people twice.

We have issued this stock just as it stands on our books. But under the consolidation, the new issue of the First national bank will be as you suggest, one hundred and twenty shares.

Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence on anything as he has apparently literally gone all to pieces.

Respectfully, E. D. EDGERTON,
President the Helena National Bank.

1, 5, '95.

32 EXHIBIT I—LETTER OF MAY 17, 1895.

"EXHIBIT I."

Incorporated 1857.

J. W. Doane, pres't. F. C. Osborn, cashier.
Orson Smith, V. pres't. F. N. Wilder, ass't cashier.

Capital and surplus, $3,800,000.

The Merchants' Loan & Trust Co.

CHICAGO, *May 17th*, 1895.

E. D. Edgerton, Esq., manager, Helena, Mont.

DEAR SIR: Your favor of the 14th inst. received. We enclose herewith certificates for 150 shares of the stock of the Helena na-

tional bank, for which please send us certificates for 120 shares of your stock in the name of P. C. Peterson.

Yours truly, E. D. HULBERT, 2 *V. Pt.*

EXHIBIT J—LETTER OF OCT. 14, 1895.

"EXHIBIT J."

Incorporated 1857.

Orson Smith, pres't. J. G. Orchard, cashier.
E. D. Hulbert, vice-pres't. F. N. Wilder, ass't cashier.

Capital and surplus, $3,500,000.

The Merchants' Loan & Trust Company.

(Copy.)

CHICAGO, *October* 14, 1895.

R. S. Ford, Esq., assignee, Great Falls, Mont.

DEAR SIR: Your favor of the 10th inst. is received. If the suit of the Helena National Bank against Ashby is not to be decided for some time, would it not be better for all concerned that we should hold this stock and endeavor to find a purchaser at a fair price rather than to slaughter it now? Please let us hear from you and oblige,

Yours truly, E. D. HULBERT, 2 *V. Pt.*

33 EXHIBIT K—LETTER OF OCT. 17, 1895.

"EXHIBIT K."

R. S. Ford, pres't. E. G. Maclay, vice-pres't.
E. B. Werneck, cashier.

4541.

Great Falls national bank.

Capital stock, $250,000.00.

GREAT FALLS, MONTANA, *Oct. 17th*, 1895.

Merchants' Loan & Trust Co., Chicago, Illinois.

GENTLEMEN: Replying to your favor of the 14th inst. The suit of The Helena Nat. Bank *vs.* S. C. Ashby to establish their claim has been put off pending a criminal suit against Ashby, which is expected to come up for trial in the November term of the U. S. court. S. C. Ashby has never denied the claim of the Helena nat. bank, nor did any of the creditors attempt to deny said claim pending 30 days' notice given them by me as assignee to take legal action against my allowing said claim. Therefore I am unable to understand the necessity of the court's passing on said claim. I have on hand enough money to pay about 14 % on all claims against S. C. Ashby, which

has been held in abeyance since July 1st, last. On account of the unsettled state of this whole matter, I cannot use this money, or loan it safely to bring any interest, and I fear the creditors will be expecting interest of me. I have never desired you to make a forced sale of this stock, but felt during the 26 months past you might have found sale at a fair price, and trust you will try and secure a good fair price before parting with it. I have never desired you to make a forced sale, though it lies in your power so to do.

Yours truly,

R. S. FORD,
Assignee of S. C. Ashby.

34 EXHIBIT L—LETTER OF JAN. 4, 1896.

"EXHIBIT L."

R. S. Ford, pres. E. G. Maclay, vice-pres't.
E. B. Weirick, cashier.

4541.

Great Falls national bank.

Capital stock, $125,000.

GREAT FALLS, MONTANA, *Jan'y 4th*, 1896.

Merchants' Loan & Trust Co., Chicago, Illinois.

GENTLEMEN: I desire to sell and convert into cash in the early spring the remaining assets of S. C. Ashby, which consists of unimproved real estate in Helena, assessed at $23,000 and 48 shares of First Nat. Bank stock of Helena. Before the last dividend is declared I would like for you to make disposition for the collateral you hold on the $12,000 loan to Mr. Ashby, or entrust it to me to sell for your benefit. I am now trying to get an offer on the 48 shares I hold. Should I meet with an offer, will let you know the price offered. I take it you still hold this stock & so held same when I sent you a dividend of $1,680, being 14 % of the amount of your claim or date of assignment of S. C. Ashby, July 26th, 1893. Kindly let me know if you still hold this stock and whether 150 shares of the Helena nat. bank, or 120 of the First nat. bank, which number of shares would be issued you in case of transfer.

Yours truly,

R. S. FORD, *Assignee.*

Endorsed on back of said letter is the following:

Your favor of the 4th inst. rec'd. 150 shares of H. N. stock held as col. to Ashby loan has been xch. for 120 sh. 1st Nat. Bk. stock. The stock is not in our name, but controlled by us. Will be glad to see if we can get reasonable price.

MR. HULBERT.

35 EXHIBIT M—LETTER OF JAN. 7, 1896.

"EXHIBIT M."

Incorporated 1857.

Orson Smith, pres't. J. G. Orchard, cashier.
E. D. Hulbert, vice-pres't. F. N. Wilder, ass't cashier.

Capital and surplus, $3,500,000.

The Merchants' Loan & Trust Company.

(Copy.)

CHICAGO, *Jan. 7th*, 1896.

R. S. Ford, Esq., assignee, Great Falls, Mont.

DEAR SIR: Your favor of the 4th inst. received. The 150 shares of Helena National Bank stock which we held as collateral to the Ashby loan has been exchanged for 120 shares of First National Bank stock. This stock is not in our name but is controlled by us. We shall be glad to sell it if we can get what seems to us a reasonable price. Please advise us of any offer you may get for it.

Yours truly, E. D. HULBERT, 2 *V. P.*

Stipulation Waiving Jury, etc.

It is hereby stipulated and agreed between the parties herein that trial by jury in this case be waived; that this cause may be submitted to the Honorable Christian C. Kohlsaat, judge of this court upon the foregoing statement of facts duly signed by the attorneys of the parties respectively, and that for the purposes of such trial the said statement of facts shall be taken as absolutely true, and shall be taken and considered as all the facts concerning the transactions therein referred to, subject to any and all objections which might properly be urged to the competency or materiality of any part thereof.

Dated this 6th day of October, 1898.

D. A. HOLMES,
Attorney for Plaintiff.
JNO. N. JEWETT,
Attorney for Defendant.

The above and foregoing contains all the evidence presented to the court at the hearing and upon which the finding and
36 judgment of the court was based. And upon application of the attorney for the plaintiff the same is allowed as a bill of exceptions in the case and ordered to be filed as such.

Dated this 13th day of May, 1899.

KOHLSAAT, *J.*

Endorsed: Gen'l No. 9141. In the district court of the United States, northern district of Illinois. E. T. Wilson, receiver of the First Nat. Bank of Helena, *vs.* The Merchants' Loan & Trust Co. Bill of exceptions. Filed May 13th, 1899. T. C. MacMillan, clerk.

And afterwards, to wit: on the 13th day of May, A. D. 1899, petition for writ of error and assignment of errors were filed in the clerk's office of the district court of the United States for the northern district of Illinois, the same being in the words and figures following, to wit:

Petition for Writ of Error. Filed May 13, 1899.

In the District Court of the United States for the Northern District of Illinois, Northern Division.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY. } At Law.

Petition for writ of error.

And now comes E. T. Wilson, receiver, plaintiff herein, and says: That on or about the 18th day of April, 1899, this court entered judgment herein in favor of the defendant against this plaintiff, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for
37 the seventh circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

D. A. HOLMES,
Attorney for Plaintiff.

Assignment of Errors. Filed May 13, 1899.

In the District Court of the United States for the Northern District of Illinois, Northern Division.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY. } At Law.

Assignment of errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

1. The court erred in finding the issues in favor of the defendant.

2. The court erred in overruling motion of plaintiff for a new trial.

3. The court erred in entering judgment in favor of the defendant and against the plaintiff.

D. A. HOLMES,
Attorney for Plaintiff.

Endorsed: No. 9141. In the district court of the United States for the northern district of Illinois, northern division. E. T. Wilson, receiver of the First National Bank of Helena, Montana, *vs.* The Merchants' Loan & Trust Company. Petition for writ of error. Assignment of errors. Filed May 13th, A. D. 1899. T. C. McMillan, clerk. D. A. Holmes, attorney for plaintiff, 843–'6 Marquette bldg.

38 And afterwards, to wit: on the 13th day of May, A. D. 1899, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, judge, to wit:

Order of May 13, 1899, *Allowing Writ of Error.*

E. T. Wilson, Receiver of the First National Bank of Helena, Montana,
vs.
The Merchants' Loan & Trust Company. } 9141.

This 13th day of May, A. D. 1899, came the plaintiff by his attorney, and filed herein and presented to the court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States circuit court of appeals for the seventh judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error.

And afterwards, to wit: on the 13th day of June, A. D. 1899, the following order was had and entered of record in said cause before the Honorable Christian C. Kohlsaat, judge, to wit:

Order of June 13, 1899, *Extending Time in which to File Record.*

E. T. Wilson, Receiver, &c.,
vs.
Merchants' Loan & Trust Company. } 9141.

On motion, and for good cause shown, it is ordered by the court that the time within which to prepare the record herein for the circuit court of appeals be and the same is hereby extended ten days.

Writ of Error. Filed May 13, 1899.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between E. T. Wilson, receiver of the First National
— of Helena, Montana, plaintiff, and The Merchants' Loan
39 and Trust Company of Chicago, Ills., defendant, a manifest error hath happened, to the great damage of the said E. T. Wilson, receiver, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the seventh circuit, together with this writ, so that you have the same in the said United States circuit court of appeals for the seventh circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals for the seventh circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern Dist. of Illinois.

Allowed by—
KOHLSAAT, *Judge.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the United States circuit court of appeals for the seventh circuit, a true and complete transcript of the record and proceedings in the foregoing-entitled cause this 21st day of June, A. D. 1899.

T. C. MACMILLAN,
Clerk United States District Court, Northern District of Illinois.

(Indorsed:) Filed May 13th, A. D. 1899. T. C. MacMillan, clerk.

40 *Clerk's Certificate.*

NORTHERN DISTRICT OF ILLINOIS, }
Northern Division. }

I, T. C. MacMillan, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in this court in the case wherein E. T. Wilson, receiver of the First National Bank of Helena, Montana, is plaintiff, and The Merchants' Loan and Trust Company, defendant, as the same appears from the records and files of said court now in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 21st day of June, A. D. 1899.

[SEAL.] T. C. MACMILLAN, *Clerk.*

Citation. Filed June 20, 1899.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Merchants' Loan & Trust Company, Chicago, Ill., Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the seventh circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the northern district of Illinois, wherein E. T. Wilson, receiver of the First National Bank of Helena, Montana, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsatt, judge of the district court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

C. C. KOHLSAAT,
U. S. Dist. Judge.

Due service of the within citation is admitted this 19th day of June, 1899.

JNO. N. JEWETT,
Att'y for the Merchants' Loan and Trust Company.

(Indorsed:) Filed June 20, 1899. T. C. MacMillan, clerk.

41 At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-room, in the city of Chicago, in said seventh circuit, on

the third day of October, 1898, of the October term, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third year.

42 And afterwards, to wit, on the twenty-second day of June, *1899, in the October term last aforesaid*, came the plaintiff in error, by his counsel, Mr. D. A. Holmes, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1898.

E. T. WILSON, Receiver of First National Bank, Helena, Montana, Plaintiff in Error,
vs.
THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO. } No. 612.

The clerk will enter my appearance as counsel for the plaintiff in error.

D. A. HOLMES,
Per PIERCE.

Endorsed: Filed Jun- 22, 1899. Edward M. Holloway, clerk.

And afterwards, on the same day, to wit, on the twenty-second day of June, 1899, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. John N. Jewett, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1898.

E. T. WILSON, Receiver of the First National Bank, Helena, Montana, Plaintiff in Error,
vs.
THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO. } No. 612.

The clerk will enter my appearance as counsel for the defendant in error.

JOHN N. JEWETT,
Att'y for Def't in Error.

Endorsed: Filed June 22, 1899. Edward M. Holloway, clerk.

43 At a regular term of the United States circuit court of appeals, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the third day of October, 1899, of the October term, in the year of our Lord one thou-

sand eight hundred and ninety-nine, and of out Independence the one hundred and twenty-fourth year.

And afterwards, to wit, on the third day of October, 1899, in the October term last aforesaid, the following proceedings were had and entered of record, to wit:

TUESDAY, *October* 3, 1899.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

44 And afterwards, on the same day, to wit, on the third day of October, 1899, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *October* 3, 1899.

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

E. T. WILSON, Receiver of the First National Bank of Helena,
vs.
MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO. } 612.

Error to the district court of the United States for the northern district of Illinois, northern division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing November 2, 1899.

And afterwards, to wit, on the sixteenth day of October, 1899, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

MONDAY, *October* 16, 1899.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. Romanzo Bunn, district judge; Hon. William J. Allen, district judge.

45 *Order.*

It is ordered by the court that William J. Allen, judge of the district court of the United States for the southern district of Illinois, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Allen appeared and took his seat as a member of said court.

And afterwards, to wit, on the second day of November, 1899, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

THURSDAY, *November* 2, 1899.

Court met pursuant to adjournment.
Present: Hon. William A. Woods, circuit judge; Hon. Romanzo Bunn, district judge; Hon. William J. Allen, district judge.

E. T. WILSON, Receiver, etc.,
vs.
MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO. } 612.

Error to the district court of the United States for the northern district of Illinois, northern division.

Now, this day, come the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. D. A. Holmes, counsel for plaintiff in error, and by Mr. John N. Jewett, counsel for defendant in error, and the court, having heard the same, takes this matter under advisement.

46 And afterwards, to wit, on the second day of January, 1900, of the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *January* 2, 1900.

Court met pursuant to adjournment.
Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

And afterwards, on the same day, to wit, on the second day of January, 1900, of the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above-entitled cause, said opinion being in the words and figures following, to wit:

47 In the United States Circuit Court of Appeals for the Seventh Circuit, October Session, 1899.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana, Plaintiff in Error,
vs.
THE MERCHANTS' LOAN AND TRUST Company of Chicago, Illinois.

No. 612. Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Before Woods, circuit judge, and Bunn and Allen, district judges.

This action was brought by E. T. Wilson, as receiver of the First National Bank of Helena, Montana, to recover of the Merchants' Loan and Trust Company, a banking corporation of Illinois, an assessment of $100 per share on one hundred and twenty shares of the stock of that bank, of which shares the bill alleges the trust company to have become the purchaser and owner at some time between December 1, 1894, and June 1, 1895. The pleas are, first, *nil debit;* second, denial of purchase and ownership of stock in the bank, and third, that the 120 shares of stock were and always had been held in the name of P. C. Peterson, as trustee, and as security for the payment of the promissory note of Shirley C. Ashby to the trust company. Trial by jury was waived by agreement in writing, and the court made a general finding of the issues for the defendant, and, having overruled a motion for a new trial, entered judgment upon the finding.

The evidence in the case, it appears by the bill of exceptions, consisted wholly of an agreed statement of facts, in substance as follows: On the 15th day of April, 1893, Shirley C. Ashby,
48 then president of the Helena National Bank of Helena, Montana, borrowed of the trust company $12,000, for which he gave his promissory note payable on the ensuing 16th day of August, and as collateral security delivered to the trust company a certificate assigned in blank representing 150 shares of the capital stock of the bank. The note recited the fact of the pledge and contained authority on the usual conditions for the sale of the shares and the application of the proceeds to the payment of the debt and expenses. On July 26 following Ashby made an assignment of his property, including the pledged shares, for the benefit of his creditors to Robert S. Ford of Grand Falls, Montana, and resigned the presidency of the bank, E. D. Edgerton succeeding him in that office. There followed correspondence between the trust company and Edgerton as president of the bank, by which the latter was told how the 150 shares were held by the trust company, and the trust company was informed of a proposed consolidation with the First National Bank of Helena, but that the stock of the Helena national bank had been reduced from $500,000 to $400,000, and consequently the 150 shares would be reissued in the same amount, less twenty per cent.; and on December 26, 1894, the vice-president of the trust company wrote to Edgerton, president, as follows:

"I enclose herewith certificates of stock for 150 sharss, for which

please send me two certificates of 50 shares each and one for 20 shares, in the name of P. C. Peterson. Mr. Peterson's address is 'care of this bank,' and we will be very glad to furnish you with proxies if you will enclose us blanks for that purpose. Where can Ashby be found? In a matter of this kind we would like very much to have him consent to our action."

The certificate was enclosed as stated and under date of December 31, 1894, Edgerton, as president, responded as follows:

"In your letter you instruct us to issue two fifty and one twenty certificates. Undoubtedly this was under the assumption of the retirement of one hundred thousand dollars I spoke of in my letter. While we have the order we have never acted on it by making the formal change, inasmuch as about that time we arranged this consolidation and thought it useless to bother our people twice. We have issued this stock just as it stands on our books. But under the consolidation the new issue of the First national bank will be as you suggest, one hundred and twenty shares. Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence on anything, as he has apparently gone all to pieces."

Subsequently and before April 22, 1896, the proposed consolidation was consummated with the consent and approval of the
49 Comptroller of the Currency, the basis being an allowance to the stockholders of the Helena national bank of eighty per cent. of the face value of their stock in the stock of the consolidated bank, which was named the First National Bank of Helena, and on or about May 17, 1895, the certificates for 150 shares in the Helena national bank standing in the name of Peterson were surrendered by direction of the trust company, and in place thereof new certificates for 120 shares in the consolidated bank were issued to Peterson. "These last-named certificates," to quote the language of the agreement, "have ever since been and now are in the possession and control of the defendant, and are held by it in the same way and for the same purpose as the certificates for one hundred and fifty shares of the capital stock of the Helena national bank were originally held, except as the conditions may have been changed by the facts hereinbefore stated, but that neither the defendant nor the said Peterson ever took any part in the management of either of said banks or participated in the administration of their affairs." There followed a correspondence between the trust company and Ashby's assignee, commencing with the letter of October 14, 1895, in which the company inquired of Ford whether a sale of the stock was possible, to which three days later Ford replied, stating certain matters concerning Ashby and his litigation, and concluding as follows:

"I have never desired you to make a forced sale of the stock, but felt during the twenty-six months past you might have found sale at a fair price, and trust you will try and secure a fair price before parting with it. I have never desired you to make a forced sale, though it lies in your power to do so."

Under date of January 4, 1896, Ford wrote again, saying:

"I am now trying to get an offer on the forty-eight shares I hold. Should I meet with an offer, will let you know the price offered. I

take it you still hold this stock, and so held same when I sent you a dividend of $1,680, being 14% of the amount of your claim, *or* (at) date of assignment, July 26, 1893. Kindly let me know if you still hold this stock, and whether 150 shares of the Helena national bank, or 120 shares of the First national bank, which number of shares would be issued to you on transfer."

On January 7, 1896, the trust company responded:

"The 150 shares of Helena National Bank stock which we held as collateral to the Ashby loan has been exchanged for 120 shares of First National Bank stock. This stock is not in our name but is controlled by us. We shall be glad to sell it if we can get what seems to us a reasonable price. Please advise us of any offer you may get for it."

Peterson, at the time of the tran-fer of the stock to him,
50 was a clerk in the employ of the trust company and was without pecuniary responsibility. The shares in the Helena national bank were directed to be placed in the name of Peterson and the new certificates of consolidated stock were issued to him by direction of the trust company in pursuance of a custom and policy of that company to avoid liability as a registered shareholder of corporate stocks. The Ashby note is still held by the trust company, and, excepting two credits of $1,680 and $960, paid December 12, 1895, and October 6, 1896, by the assignee, remains unpaid. The facts of the suspension of the bank, the appointment of a receiver, the assessment of $100 per share on the stock, notice to stockholders, and demand of payment are all stated in detail.

Three errors are assigned, the finding of the issues for the defendant, the overruling of the motion for a new trial, and the entry of judgment in favor of the defendant.

Woods, circuit judge, after making the foregoing statement, delivered the opinion of the court:

It is urged by the defendant in error that the specifications of error call for an inquiry into issues of fact and present no question for review. The response for the plaintiff in error is that the agreed statement of facts is to be treated as a special finding on which the question arises whether the facts stated are sufficient to sustain the judgment rendered. It is well enough settled that an agreed statement of facts on which judgment has been rendered will be taken as the equivalent of a special finding. Supervisors *v.* Kinnecott, 103 U. S., 554; Lehman *v.* Dickson, 148 U. S., 71; St. Louis *v.* Western Union Tel. Co., 148 U. S., 92; "but manifestly," as we said in Burnham *v.* North Chicago St. R'y Co., 46 U. S. App., 670; 23 C. C. A., 677, "it is necessary that the ultimate facts be stated, and not evidence merely from which the facts to be established may be inferable." See, also, Mutual Reserve &c. Ass'n *v.* Curtis' Adm'r, 56 U. S. App., 586. The agreement before us to a large extent contains a statement of ultimate facts, sufficient, the plaintiff in error insists, to justify a judgment in his favor, but it consists in part of letters written by or to the defendant in error, which in so far as their contents are pertinent to the issues are not conclusive but only evidentiary.

The decisions of the Supreme Court touching the liability of shareholders for assessments upon the stock of national banks were reviewed and the principles deducible from them comprehensively stated in the recent opinion of that court in Pauly *v.* State Loan and Trust Company, 165 U. S., 606. While the rule is well
51 established "that the real owner of the shares of the stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151" of the Revised Statutes, it is also true, as there stated and as was decided in Anderson *v.* Philadelphia Warehouse Company, 111 U. S., 79, "that if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151." The facts in Anderson *v.* Philadelphia Warehouse Company differ but little from the facts disclosed in this record, and this case must be governed by that unless the one distinction insisted upon by the plaintiff in error must be recognized, namely, that the turning of the shares in the Helena national bank into shares of the First National Bank of Helena was effected without the consent or authority of Ashby, the pledgor, and therefore was a wrongful conversion, which made the trust company the absolute owner of the stock and liable for the assessment upon it notwithstanding its being taken in the name of Peterson. This proposition is subject to more than one objection. In the first place, if the change was made without Ashby's consent or authority, it was nevertheless a matter of election on his part whether he would ratify it, and in the second place it is not shown by the statement of facts that the consolidation and the substitution of one stock for the other were not effected by his authority, or were not afterwards ratified by him, nor that they were not effected by the authority of or afterward ratified by his assignee, Ford. Neither is it shown that the assignee under the law and by order of the court, and by the consent of Ashby, did not have authority to consent to the substitution. The letters show that the trust company desired Ashby's consent, and that Edgerton did not think it likely that he would give it, but that does not prove that it was not in fact obtained. It is fairly inferable from the letters of the assignee, that before hearing from the trust company, and presumably from the beginning, he knew of the scheme for the consolidation, and it may well be supposed that he approved it. The fact of subsequent
52 consent and ratification by him is quite clear. It was alleged in the declaration, and the plaintiff in error therefore had the burden of proof, that the trust company "purchased and became the owner of 120 shares of the capital stock of the said First National

Bank of Helena." To establish that averment it was necessary to show that the original shares, confessedly held as collateral, were wrongfully converted into the new stock without the consent of the pledgor; but the fact is not so stated in the agreement; the letters and other circumstances all indicate the contrary; and the general finding of the court is conclusive of the question.

The judgment below is affirmed.

53 And afterwards, on the same day, to wit, on the second day of January, 1900, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *January* 2, 1900.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

Before Hon. William A. Woods, circuit judge; Hon. Romanzo Bunn, district judge; Hon. William J. Allen, district judge.

E. T. WILSON, Receiver of the First National Bank, Helena, Montana,
vs.
THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO, Illinois. } 612.

Error to the district court of the United States for the northern district of Illinois, northern division.

This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Illinois and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed with costs.

54 And afterwards, to wit, on the thirty-first day of January, 1900, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

WEDNESDAY, *January* 31, 1900.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Romanzo Bunn, district judge.

E. T. WILSON, Receiver, etc.,
vs.
THE MERCHANTS' LOAN AND TRUST COMPANY OF CHICAGO. } 612.

Error to the district court of the United States for the northern district of Illinois, northern division.

On reading and filing the order of plaintiff in error in said cause to stay the mandate of this court to the court below, and after hearing Delevan A. Holmes, Esq., solicitor for plaintiff in error, and John N. Jewett, Esq., solicitor for defendant in error, it is ordered that neither the mandate nor any process in the nature of a *procedendo* from this court to the court below be issued at the expiration of thirty days from the date of the judgment or decree entered in this case, as by rule of this court provided, but that said time of issuing a mandate, thirty days from the date of judgment, be, and the same is hereby, enlarged and extended to sixty days from date of judgment herein, and the mandate or other process in the nature of a *procedendo* to the court below is hereby stayed until the expiration of sixty days from the date of the judgment or decree rendered in this court.

55 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 54, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of E. T. Wilson, receiver of the First National Bank of Helena, *vs.* The Merchants' Loan and Trust Company of Chicago, No. 612, October term, 1899, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this twelfth day of February, A. D. 1900.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

56 And afterwards, to wit, on the first day of March, 1900, in the October term last aforesaid, came the plaintiff in error, by his counsel, Mr. Delevan A. Holmes, and filed in the office of the clerk of this court his petition for writ of error to the Supreme Court of the United States and his assignment of errors, said petition for writ of error and assignment of errors being in the words and figures following, to wit:

57 In the Supreme Court of the United States.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana, Plaintiff in Error,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY OF CHICAGO, ILLINOIS, Defendants in Error.

To the Honorable Henry B. Brown, associate justice of said court:

E. T. Wilson, receiver, the plaintiff in error in this case, hereby petitions your honor to allow a writ of error in this cause to the United States circuit court of appeals for the seventh circuit, and for cause thereof states—

That on the second day of January, A. D. 1900, the said circuit court of appeals entered a judgment therein in favor of the defendant in error against the plaintiff in error, in which judgment and proceedings certain errors were committed to the prejudice of the plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

DELEVAN A. HOLMES,
Att'y for Pl'ff in Error.

WM. E. MASON, *Of Counsel.*

Allowed.
H. B. BROWN,
Asso. Justice.

58 In the Supreme Court of the United States.

E. T. WILSON, Receiver of the First National Bank of Helena, Montana, Plaintiff in Error,
vs.
THE MERCHANTS' LOAN & TRUST COMPANY OF CHICAGO, ILLINOIS, Defendants in Error.

Assignment of Errors.

The plaintiff in error in this cause, in connection with his petition for a writ of error, says that in the judgment of the United States circuit court of appeals in this cause there is manifest error, to wit:

1st. The court erred in holding that the exchange by the defendant in error of stock in the Helena national bank, held by it in pledge for stock in the First National Bank of Helena, if made without the consent or authority of Ashby, the pledgor, was nevertheless a matter which might subsequently be ratified by him or his assignee, and that such subsequent ratification would relieve the defendant in error of the responsibility of such exchange.

2nd. The court erred in holding that the burden of proof was upon the plaintiff in error to establish the fact that the original shares confessedly held as collateral were wrongfully converted into the new stock without the consent of the pledgor.

59 3rd. The court erred in finding that the agreed statement of facts does not show the wrongful conversion by the defend-

ant in error of the original shares into the new stock without the consent of the pledgor.

4th. The court erred in its conclusion that the letters and other circumstances all indicate that the original shares were not wrongfully converted into the new stock without the consent of the pledgor.

5th. The court erred in holding as a matter of law that the general finding of the district court is conclusive of the question as to the wrongful conversion of the original shares by the defendant in error.

6th. Said judgment is erroneous because it is in favor of the defendant in error and against the plaintiff in error, whereas upon the entire record it should have been in favor of the plaintiff in error.

For the errors alleged the plaintiff in error prays that the said judgment be reversed and remanded for further proceedings in accordance with law.

DELEVAN A. HOLMES,
Att'y for Pl'ff in Error.

WM. E. MASON, *Of Counsel.*

60 [Endorsed:] Filed Mar. 1–, 1900. Edward M. Holloway, clerk.

61 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 59, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of E. T. Wilson, receiver of the First National Bank of Helena, Montana, *vs.* The Merchants' Loan and Trust Company of Chicago, Illinois, No. 612, October term, 1899, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this second day of March, A. D. 1900.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of *the United States circuit court of appeals for the* seventh circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between E. T. Wilson, receiver of the First National Bank of Helena, Montana, plaintiff in error, and The Merchants' Loan and Trust Company of Chicago, Illinois, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

63 [Endorsed:] Supreme Court of the United States. E. T. Wilson, receiver of theFirst National Bank of Helena, Montana, plaintiff in error, *vs.* The Merchants' Loan and Trust Company of Chicago, Illinois, defendant in error. Writ of error. Filed Mar. 1, 1900. Edward M. Holloway, clerk. Copy deposited for the defendant in error in the clerk's office of the United States circuit court of appeals for the seventh circuit.

In obedience to the within writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this second day of March, A. D. 1900.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

64 UNITED STATES OF AMERICA, *ss:*

To the Merchants' Loan and Trust Company of Chicago, Illinois, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the seventh circuit, wherein E. T. Wilson, receiver of the First National Bank of Helena, Montana, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 27th day of February, in the year of our Lord one thousand nine hundred.

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

65 [Endorsed:] Filed Mar. 1, 1900. Edward M. Holloway, clerk.

On this first day of March, in the year of our Lord one thousand nine hundred, personally appeared before me, the subscriber, Turner Pierce, and makes oath that he delivered a true copy of the within citation to John N. Jewett, attorney in this behalf of the within-named The Merchants' Loan & Trust Company.

TURNER PIERCE.

Sworn to and subscribed the 1st day of March, A. D. 1900.

[Seal Wallace E. Shirra, Notary Public, Cook Co., Ills.]

WALLACE E. SHIRRA,
Notary Public.

Due service of the within & foregoing citation is admitted this 1st day of March, 1900.

JNO. N. JEWETT,
Att'y for the Merchants' Loan & Trust Company.

Endorsed on cover: File No., 17,774. U. S. circuit court of appeals, 7th circuit. Term No., 290. E. T. Wilson, receiver of the First National Bank of Helena, Montana, plaintiff in error, *vs.* The Merchants' Loan and Trust Company of Chicago, Illinois. Filed May 24, 1900.

No. 269. 67.
Holmes & Mason for
Brief of Pl'ff

Office Supreme Court U.S.
FILED
APR 15 1901
JAMES H. MCKENNEY,
Clerk.

Filed April 15, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 269.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA,
Plaintiff in Error,
vs.
THE MERCHANTS LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF PLAINTIFF IN ERROR.

DELEVAN A. HOLMES,
For Plaintiff in Error.

W. E. MASON,
of Counsel.

JOHN N. JEWETT,
For Defendant in Error.

BARNARD & MILLER, PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 290.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA,
Plaintiff in Error,
vs.
THE MERCHANTS LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF PLAINTIFF IN ERROR.

DELEVAN A. HOLMES,
For Plaintiff in Error.

W. E. MASON,
of Counsel.

JOHN N. JEWETT,
For Defendant in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 290.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA,
Plaintiff in Error,
vs.
THE MERCHANTS LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the District Court of the United States for the Northern District of Illinois, Northern Division, by E. T. Wilson, Receiver of the First National Bank of Helena, Montana, to recover from The Merchants Loan & Trust Company, a corporation of Illinois, an assessment of One Hundred Dollars ($100) per share upon one hundred and twenty (120) shares of the stock of said First National Bank.

The declaration after reciting the fact of the insolvency of the National Bank, the appointment of Receivers and the assessment upon the shareholders, states in substance:

That the defendant, The Merchants Loan & Trust Company had some time between the first day of Decem-

ber, 1894, and the first day of June, 1895, purchased and become the owner of one hundred and twenty (120) shares of the capital stock of said National Bank, and continued to be, and was at the time of the suspension of the Bank, the owner of same. But, in order to evade the responsibility of a shareholder, had caused said shares to be carried in the name of P. C. Peterson, one of its employees, who was a person of small means and not responsible financially.

The pleas were, first, *nil debit;* second, denial of purchase and ownership of stock by the Trust Company, and third, that the one hundred and twenty shares of stock were held in the name of P. C. Peterson as trustee for the security of the payment of a promisory note of one Ashby to the Trust Company. There was a written stipulation waiving trial by jury, and the cause was submitted to the Court upon an agreed statement of facts.

The court made a general finding of the issues for the defendant and entered judgment thereon, from which the plaintiff prosecuted error in the Circuit Court of Appeals for the Seventh Circuit, where the judgment of the District Court was affirmed. The case now comes to this court upon Writ of Error to the said Circuit Court of Appeals.

The errors assigned in the Circuit Court of Appeals were:

First: The court erred in finding the issues in favor of the defendant.

Second: The court erred in overruling the motion of the plaintiff for a new trial.

Third: The court erred in entering judgment in favor of the defendant and against the plaintiff.

The facts upon which the action was predicated, briefly stated, are as follows:

On the 15th day of April, 1893, the defendant received from one Ashby one hundred and fifty shares of stock in the Helena National Bank (of which bank said Ashby was then president) as collateral security for his note of $12,000, due August 16, 1893.

On the 26th day of July, 1893, said Ashby made an assignment of his property for the benefit of creditors, to one, Robert S. Ford, assignee; included in said assignment, was the certificate for the one hundred and fifty shares of stock aforesaid, which was described as then held by the Merchants' Loan & Trust Company in pledge. (Rec., 10.)

Nothing further was done with this stock, and it continued to stand in the name of Ashby until December 26, 1894, when it was sent by the defendant to the then president of the Helena National Bank, with instructions to transfer to the name of P. C. Peterson. (Ex. G. Rec., 24.)

Some time between December 31st, 1894, and April 22nd, 1895, the Helena National Bank was with the consent and approval of the Comptroller of the Currency, consolidated with the First National Bank of Helena.

No further change was made until May 17, 1895, when the certificates so standing in the name of Peterson were by the defendant sent to E, D. Edgerton, Manager, Helena, Montana and exchanged for one hundred and twenty shares of stock in the First National Bank of Helena. (Ex. I, Rec. 25.)

This transfer was without the knowledge of Ashby or his assignee, Ford. (Ex. L and M, Rec. 27 and 28.)

P. C. Peterson was, at the time of the transfer to him

of the stock, a clerk in the employ of the defendant, and without pecuniary responsibility, and held said stock for the defendant. (Rec. 12.)

The defendant caused the stock to be so transferred to Peterson because it was unwilling to appear as a stockholder on the books of other corporations and assume a stockholder's liability. (Rec. 12.)

Eight months before this exchange of stock, and some time before the consolidation of the two banks as aforesaid, the Helena National was the most prosperous of the five National Banks in Helena, its business was increasing rapidly, while the business of the First National was with equal rapidity diminishing—as shown by letter of E. D. Edgerton, President, dated September 5th, 1894—and comparative statement of Helena Banks enclosed and referred to in said letter. See Exhibit "B" (Rec. 14 to 19.)

On the 4th day of September, 1896, the First National Bank of Helena suspended, and on September 10th a receiver was appointed by the Comptroller of he Currency. On November 9, 1897, E. T. Wilson, the plaintiff, succeeded to the receivership and has since been and now is the receiver of said bank. On October 11, 1897, an assessment of $100 per share on the stock of said bank, payable November 11th, 1897, was levied by the Comptroller of the Currency, of which Peterson and the defendant were notified, but no part of the assessment so levied upon the one hundred and twenty shares held by Peterson for the defendant has been paid. (Rec. 13.)

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Specification of Errors.

First: The court erred in holding that the exchange by the defendant in error of stock in the Helena National Bank held by it in pledge, for stock in the First National Bank of Helena, if made without the consent or authority of Ashby, the pledgor, was nevertheless, a matter which might subsequently be ratified by him or his assignee, and that such subsequent ratification would relieve the defendant in error of the responsibility of such exchange.

Second: The court erred in holding that the burden of proof was upon the plaintiff in error to establish the fact that the original shares confessedly held as collateral, were wrongfully converted into the new stock, without the consent of the pledgor.

Third: The court erred in finding that the agreed statement of facts does not show the wrongful conversion by the defendant in error of the original shares into the new stock, without the consent of the pledgor.

Fourth: The court erred in its conclusion that the letters and other circumstances all indicate that the original shares were not wrongfully converted into the new stock, without the consent of the pledgor.

Fifth: The court erred in holding as a matter of law, that the general finding of the District Court is conclusive of the question as to the wrongful conversion of the original shares by the defendant in error.

Sixth: Said judgment is erroneous because it is in favor of the defendant in error and against the plaintiff in error, whereas, upon the entire record it should have been in favor of the plaintiff in error.

Brief of the Argument.

IT WAS URGED BY THE DEFENDANT IN ERROR IN THE COURT BELOW AND DOUBTLESS WILL BE HERE, THAT THE RECORD MADE IN THE TRIAL COURT AND THE SPECIFICATIONS OF ERROR PRESENTED NO QUESTION FOR REVIEW, IT BEING CONTENDED THAT THE RECORD CONTAINED NO STATEMENT OF ULTIMATE FACTS AND NO SPECIAL FINDINGS UPON WHICH THE JUDGMENT OF THE TRIAL COURT WAS BASED.

The Circuit Court of Appeals announced no decision upon this point, and it may be fairly inferred from the somewhat lengthy discussion of the facts, that the objection was not considered as well taken; in as much, however, as this question strikes at the power of this court to now review the record, we deem it proper to call attention to it at the outset of the argument.

This contention of Counsel for defendant in error was based upon the fact that in the agreed statement of facts, upon which the case was submitted, reference was had to a number of letters and statements attached thereto as exhibits, which it is claimed are not conclusive, but only evidentiary.

The Statement of Facts beginning on page 9 of the Record and ending with the exhibits on page 28, is followed by a stipulation:

"It is hereby stipulated and agreed between the parties herein that trial by jury in this case be waived. That this cause may be submitted to the Honorable Christian C. Kohlsaat, Judge of this court, upon the foregoing State-

ment of Facts duly signed by the attorneys of the parties respectively, and that for the purposes of such trial the said Statement of Facts shall be taken as absolutely true, and shall be taken and construed as all the facts concerning the transactions therein referred to, subject to any and all objections which might properly be urged to the competency or materiality of any part thereof."

This statement of facts with the exhibits and stipulation were subsequent to the entry of judgment by the District Court, and on the 13th of May, 1899, allowed and filed as a Bill of Exceptions in the case. (Rec. 9.) The certificate of the trial judge to the same being as follows:

> "The above and foregoing contains all the evidence presented to the court at the hearing and upon which the finding and judgment of the court was based, and upon application of the attorney for the plaintiff the same is allowed as a Bill of Exceptions in the case and ordered to be filed as such. (Rec. 28.)

The judgment of the court is in the following language:

> "Now come the parties by their attorneys, thereupon the jury is waived by written stipulation and this cause is submitted to the court for trial, and the court having heard the evidence and arguments of counsel and being now fully advised, finds the issues for the defendant. To which finding the plaintiff excepts, etc." (Rec., 8.)

Reading this judgment and finding of the court in connection with the Bill of Exceptions, it is no more than a declaration that the court found the law to be in favor of the defendant on the case as stated.

Supervisors v. *Kennicott,* 103 U. S., 554.

We understand the rule with reference to questions of this kind to be, that where the record presents conflicting

evidence as to questions of fact, a Court of Review will not assume the functions of a jury and weigh the evidence to determine whether or not the finding of the lower court is supported by the evidence, but, when the case comes up either upon a special verdict, a special finding by the court, or a general finding, where the facts are without dispute and agreed between the parties, a Reviewing Court has the right and power, and has never refused to consider the case at length to determine whether, upon the facts as so stated or agreed, the decision of the trial court is right as a matter of law.

This question has been under consideration by this court and fully determined so frequently, that we should not be inclined to give it more than passing notice but for the fact that the high standing at the bar of counsel for defendant in error is sufficient to justify the presumption that he does not thus seek to avoid the consideration of this case upon its merits without himself believing that his objections are well taken. We therefore, beg the indulgence of the court while we refer briefly to former decisions on this point.

Counsel for defendant in error, in his brief filed in the Court of Appeals, refers to the case of *Supreme Lodge Knights of Pythias* v. *England,* 94 Federal, 369, where the question was as to the sufficiency of the evidence to sustain the general findings of fact; and, *Hoge* v. *Magnes,* 56 U. S. App., 500, where the general finding was based upon conflicting evidence which covered many pages of the record, and an agreed statement relative to a part, only, of the facts; and, *Minchen* v. *Hart,* 36 U. S. App., 534, where the case was tried upon evidence taken before the court, and where the assignment of error was that the evidence did not warrant the court in finding the issues

of fact as it did. And lastly, the case of *Lehnen* v. *Dickson*, 148 U. S., 71, where the court expressly stated, "There is no special findings of fact and no agreed statement of fact." This last case expressly recognizes the rule which we are contending for, as the court says:

> "It is true if there be an agreed statement of facts submitted to the trial court and upon which its judgment is formed, such agreed statement of facts will be taken as the equivalent of a special finding of fact."

The earliest decision of this court to which we shall call attention is that of *United States* v. *Eliason*, 16 Peters, 292. There the record contained an agreed statement, not of ultimate facts, but of the evidence, upon which the case was submitted. This evidence embraced on the part of the plaintiff a transcript from the Treasury Department covering several pages of the record, evidence on the part of the defendant to show that the original defendant (then deceased) was a captain in the United States Corps of Engineers, and as such superintended and had charge of certain work; Regulations of the War Department showing the rate and percentage of compensation allowed in such cases, and further evidence on the part of the defendant showing the disbursements by intestate, and claiming credit for certain compensation, a part only, of which had been allowed; evidence that the claims had been submitted to, and rejected by the accounting officer of the Treasury; and further, a statement of the state of the appropriations under which the disbursements were made. The plaintiff then offered in evidence regulations of the War Department and provisos in certain Acts of Congress; and upon such statement it was submitted to the court to say whether intestate was entitled to the allowances claimed by him, as a matter of law.

The question was raised as to whether a writ of error would lie from the decision.

The trial court made no special finding of fact, but announced only its conclusions of law upon the evidence as thus stated, and this court after a lengthy discussion of the practice in the English courts, and the various decisions in this country prior to that time, said:

> "This court therefore, have no hesitancy in declaring the point of practice raised by the defendant's counsel presents no objection to the regularity in the mode of bringing this case before them."

And again, in *Stimpson* v. *Railway Company,* 10 Howard, 329, which was a suit for an alleged infringment of patent right, the cause was submitted to the court upon a statement of facts, which entered into details of evidence, contained schedules referred to in letters patent, and the letters themselves, and it was submitted to the court to determine, "whether the defendant under a just construction of said patent declared upon, has been guilty of any violation thereof * * * * * and that the court shall have the power to draw all inferences from the facts herein stated, which could be drawn by jury."

In this case the right of the court to take cognizance of the cause was disputed.

The opinion is by Mr. Justice Daniel, who discusses at length the specifications in the patent, and concludes, as follows: "This court therefore, has no hesitancy in declaring the point of practice raised by the defendant's counsel, presents no objection to the regularity in the mode of bringing the case before it."

This question was again presented in *Suydam* v. *Williamson, et al,* 20 Howard, 427.

The opinion is by Mr. Justice Clifford, who, after discussing at some length, the rules of practice and the reasons for them, says:

> "And we here remark for the purpose of illustration, it is not so much because the proceeding is denominated a special verdict that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error." And again, "where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by special verdict, or according to the rule established in this court, by an agreed statement of fact."

We think it may be safely said, therefore, that a case is entitled to review upon the merits wherever and whenever the record places the Appellate tribunal in the same position as to the facts, and with all the information touching the questions involved, that was before the trial court at the time of entering the judgment complained of.

And submit, with entire confidence, that the record in this case, presents solely questions of law which this court can pass upon with the same freedom and understanding as did the District Court.

Owing to the fact that there are presented no questions which call for specific rulings, that the finding of the trial court was a general one, and that the finding and judgment of the Circuit Court of Appeals presents no propositions separately and specifically stated, we have experienced no little difficulty in determining upon the order and arrangement of our argument in this court, as all questions arising from the record converge toward a

single point, viz: Upon the facts stated. Is the defendant in error liable for the assessment upon the shares in the First National Bank of Helena in controversy?

We have, therefore, after due consideration, adopted the following arbitrary division of the question.

Point I.

THE ONE HUNDRED AND TWENTY SHARES OF STOCK WERE HELD BY P. C. PETERSON AS AGENT FOR THE DEFENDANT IN ERROR, AND DEFENDANT IN ERROR IS LIABLE FOR ANY ASSESSMENTS WHICH HE MIGHT BE CALLED UPON TO PAY.

Point II.

THE SHARES OF STOCK IN CONTROVERSY ARE NOT AND NEVER WERE HELD BY THE DEFENDANT IN ERROR OR P. C. PETERSON AS PLEDGEE.

Point III.

BY THE EXCHANGE OF THE STOCK IN THE HELENA NATIONAL BANK ORIGINALLY PLEDGED, FOR THE SHARES IN THE FIRST NATIONAL BANK, THE DEFENDANT IN ERROR BECAME, FOR THE PURPOSES OF THIS ACTION, THE REAL OWNER OF THE SHARES SO RECEIVED IN EXCHANGE.

Point IV.

THE FACT OF AN UNLAWFUL SALE HAVING BEEN ESTABLISHED, THE BURDEN OF PROOF IS UPON THE DEFENDANT IN ERROR TO SHOW SUBSEQUENT RATIFICATION BY A PERSON AUTHORIZED TO RATIFY SUCH SALE, OR ANY OTHER MATTER IN AVOIDANCE OF LIABILITY.

Point I.

THE ONE HUNDRED AND TWENTY SHARES OF STOCK WERE HELD BY P. C. PETERSON AS AGENT FOR THE DEFENDANT IN ERROR, AND DEFENDANT IN ERROR IS LIABLE FOR ANY ASSESSMENTS WHICH HE MIGHT BE CALLED UPON TO PAY.

In *Davis, Receiver,* v. *Stevens,* 17th Blatch., 259, Stevens was sued for an assessment upon stock standing in the name of one Elston on the books of the bank at the time of the failure. It did not appear from the record that any of the shares upon which the assessments were levied had ever stood in the name of Stevens on the books of the bank, but that Stevens had actually purchased them through Elston, his agent, and by his direction they had been placed in the name of Elston. Upon this state of facts the trial court directed a verdict in favor of the defendant. The opinion is by Waite, Ch. J., who, after discussing the several questions presented, on page 261, says:

> "Under these provisions of law, it is contended that the registered shareholders alone can be charged with statutory liability, and that an assignee of stock does not make himself responsible unless he accepts an actual transfer in his own name on the books. * * * Stevens, by his transfer on the books, undoubtedly released the vendors from all future liability, because, as to them, the transfers were 'out and out,' in the language of the English cases, and not colorable only. They retained no interest whatever, and Elston the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, *Stevens was the real owner,*

and Elston his authorized representative in the bank. Every principal is responsible for the obligations of his agent. The debt of the agent is the debt of the principal. By the rules of law which govern the relations of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect, the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens."

In Case *Receiver* v. *Small,* 10 Fed. Rep., 722, which was a suit by the receiver of the Crescent City National Bank to recover an assessment upon fifty shares of stock, it appeared that the fifty shares were sold, just prior to the failure of the bank, through a broker; that they were purchased by I. K. Small, and paid for by him, and were transferred on the books of the bank by the broker to Miss E. M. Small, his sister; that Miss Small was a person of no pecuniary responsibility. Upon these facts the court said:

"And finally, it is argued that under Sec. 5151, Rev. St., no person can be made liable unless at some time or other he has been a stockholder of record, and been held out to the world as such. The law seems to be settled now, that the owners of stock are liable under that section.

"At the same time those persons who hold themselves, or allow themselves to be held out as owners of stock, are liable whether they own stock or not. It would seem that the rules relating to the ownership of national bank stock are about the same as applied to partnership. Real partners are liable, though not publicly known as partners, and persons who allow themselves to be held out as partners are liable, though they have no real interest."

Accordingly a decree was entered against I. K. Small, the purchaser of the stock.

In *Hubbell* v. *Houghton*, 86 Fed. Rep., 547, it is said:

> "The shares of the capital stock of the National Banking Association involved in this litigation were never entered on the books of the association in a way which would indicate ownership of them by the defendant; nevertheless, when they were acquired by the parties in whose names they appeared on its books at the time it became insolvent, they were acquired by them as the agents of the defendant; and from the time they were acquired the substantial proprietorship had always been in the defendant, and the defendant had always held the corresponding stock certificates, so indorsed that it was in his power to have the shares properly registered in his name at any time."

After an elaborate discussion of the authorities the court by PUTNAM J., rendered judgment for the full amount of the assessment.

This judgment was affirmed by the Circuit Court of Appeals in *Houghton* v. *Hubbell*, 91 Fed. Rep., 453. The opinion is by ALDRICH, District Judge, who says:

> "In this case we have no cause to deal with the question whether the assessment could have been sustained against the agents who purchased the stock for Mr. Houghton and appeared on the records of the bank as owners. The fact that the record holders may be held does not necessarily mean that the actual holders may not be held. The general finding established the fact that the defendant was the real owner of the stock at the time the bank suspended and when the assessment was made by the comptroller. While there is perhaps no express Supreme Court authority to that effect in a case exactly in point, the various expressions in the following authorities indicate clearly enough the understanding of the Supreme Court, that the real owner may properly be assessed and held (then follows a discussion

of various decisions of the Supreme Court, also the case of *Davis* v. *Stevens, Id.*) It is according to principle that a burden of this character should rest upon the actual owner, and as a general rule there is no safer party to pursue than the actual responsible owner, upon whom the ultimate liability must rest. Assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the Comptroller might properly, in his discretion, elect to pursue directly the actually known owner. In doing so in this case, the Comptroller elected the most equitable of the legal remedies and the one which sensibly avoided circuity of action and unnecessary litigation by striking at once the source upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must finally fall. It cannot be seen that any legal rule interposes in a situation like this, to prevent reaching a result directly which admittedly can be reached indirectly. Neither can we see any prudential reason for pursuing an indirect legal course when a direct one is fairly and plainly open."

The foregoing authorities seem to fully support our first contention and justify the court in this case in rendering any judgment against the defendant which might have been recovered against P. C. Peterson, as the admitted facts show conclusively that he was the agent of the defendant.

It is contended on the part of defendant in error that Peterson could not be held liable for an assessment because, he as a matter of fact, held the stock as trustee for the defendant, and that Section 5152 of the Statute expressly exempts trustees from any personal liability.

From the language of the entire section, it must be apparent that the person to be protected as trustee is the representative of some deceased person, or person who

is laboring under disability, rendering him incompetent to act and hold the stock in his own name, as the section referred to expressly provides, "That the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such funds would be if living and competent to act and hold stock in his own name.

Point II.

THE SHARES OF STOCK IN CONTROVERSY ARE NOT AND NEVER WERE HELD BY THE DEFENDANT IN ERROR OR P. C. PETERSON AS PLEDGEE.

Had this action been brought to recover an assessment levied upon the stock of the Helena National Bank, pledged by Ashby to the defendant on the 15th day of April, 1893, doubtless the defendant could have escaped liability, but such is not the case. That pledge was terminated when, on the 17th day of May, 1895, more than two years after such pledge was made, the defendant sold the said stock to E. D. Edgerton, and received in exchange therefor the stock which is now in controversy. In *Robinson* v. *Southern National Bank of New York*, 94 Fed. Rep., 964, it appeared that in January, 1893, one Curtis was the owner of 180 shares of the capital stock of the State National Bank of Vernon, Texas, which stood in his name on the books of the bank and for which he held the usual certificates; on that day he pledged the shares with the defendant as collateral security for the payment of certain liabilities, including a note for $15,000, payable four months after date; that the note was not paid at maturity, and in August, 1893, the defendant

advertised the stock to be sold at auction at the public exchange in New York City, and gave eight days' notice by telegraph to the pledgor; at the sale the defendant bought the stock and credited the proceeds of the sale upon the note; the certificates remained in possession of the defendant, but the stock was never transferred to the defendant upon the books of the bank. Upon these facts the Circuit Court of Appeals of the Second Circuit held:

> "That the facts certainly would have justified a finding by the jury that the relations of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner when the bank failed. The only ground upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank and remained in the name of the original owner, the defendant was not a shareholder within the meaning of Section 5151."

Now, if, as in that case, the relations of pledgor and pledgee terminated when the identical stock pledged was bought in by the pledgee, which stock, while so standing in the name of the pledgee, would be subject to redemption in equity by the pledgor, how much stronger is the reason for holding the pledge in the case at bar to have terminated on May 17, 1895, when the pledgee made absolute disposition to third parties of the stock pledged.

Again, to create a pledge, there must exist all of the necessary elements of a contract; first, there must be parties capable of contracting, and second, a coming together of the minds of the contracting parties; now, if it is to be said that the stock in controversy was held by the agent of the defendant in pledge, we ask, in all sincerity, by whom was the pledge made? Certainly not by Ashby,

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as he never owned the stock in controversy. The elements of mutuality necessary to the transaction are lacking, because neither Ashby nor his assignee were ever consulted concerning the transaction. According to the agreed statement of facts the exchange was made *with the consent and under the directions of the defendant.* (Rec. 11.)

If, then, as we have shown, Ashby did not pledge this stock at the time it was acquired by the defendant, and neither he nor Ford, who by the assignment of July, 1893, succeeded to the equity of redemption of the old stock, subsequently by affirmative action placed themselves in the attitude of pledgor, it is not in the province of the court to create by its judgment a contract between the parties, and therefore no pledge can be said to have existed.

Point III.

BY THE EXCHANGE OF THE STOCK IN THE HELENA NATIONAL BANK ORIGINALLY PLEDGED, FOR THE SHARES IN THE FIRST NATIONAL BANK, THE DEFENDANT IN ERROR BECAME, FOR THE PURPOSES OF THIS ACTION, THE REAL OWNER OF THE SHARES SO RECEIVED IN EXCHANGE.

By the Revised Statutes of the United States it is provided:

> Section 5139. "*** every person becoming a shareholder by such transfer shall in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares***"

As a matter of first impression it might occur to the court that the questions herein involved have been settled

by former decisions, and that the exhaustive opinion in *Pauly* v. *State Loan & Trust Company,* 165 U. S., 606, has disposed of all possible questions that might arise touching the liability of holders of National Bank stock, but, if we read the decisions correctly, the precise question presented by this record has never hitherto been considered.

In *Germania Bank of New Orleans* v. *Case,* Receiver, 99 U. S., 628, it was conclusively shown that the stock in controversy had been assigned to the Germania Bank as collateral security for the payment of a note. This note matured four days before the failure of the Crescent City Bank. On that day one hundred shares of the stock was transferred on the books of the Crescent City Bank to the Germania Bank. Seventy-six shares were immediately transferred to Waldo, one of the clerks of the Germania Bank, and on the following day the remaining twenty-four shares were transferred to him.

It was unquestioned that Waldo in holding the stock acted as the agent of the Germania Bank, which was held liable for the assessment, not because of any question as to the fact of the stock being held as collateral security, but because by the transfer the liability of Phelps, McCullough & Co., the pledgors of the stock, for assessment, ceased at the instant of the transfer.

In *Anderson, Receiver,* v. *Philadelphia Warehouse Company,* 111 U. S., 479, The defendant was held not liable for assessments, because, although it appeared from the record that for seven years the stock had stood in the name of the agent of the Warehouse Company, it also appeared that the transfer was originally made as a pledge; that the pledgor of the stock had during that en-

tire period of time received dividends, voted the stock, and to all intents and purposes controlled the stock.

This decision in no sense modifies the doctrine of the Germania Bank case.

In *Pauly* v. *State Loan & Trust Co., Id.* The stock upon which it was attempted to hold the defendant liable, had been issued to it as pledgee, which fact appeared plainly not only upon the certificates, but upon the books of the bank, and although in the opinion, Mr. Justice Harlan discusses at great length, not only the theory and principles of the law, but all of the earlier decisions, not a syllable can be found that in the slightest degree criticises or modifies the decision in the Germania Bank case. On the contrary, the learned Justice says,

> "From these cases the following rules relating to the liability of the shareholders of National Banking Associations may be deduced. That the *real owner of the shares* (the italics are ours) of the capital stock of a National Banking Association may in every case be treated as a shareholder within the meaning of Section 5151***"
>
> "That if the real owner of the shares transfers them to another person or *causes them to be placed on the books of the association in the name of another person* (the italics are ours) with the intent simply to evade the responsibility imposed by Section 5151 on shareholders of National Banking Associations, such owner may be treated, for the purposes of that section, as a shareholder and liable as herein prescribed."

A careful reading of these various decisions indicates that the court has in all cases sought to reach a conclusion as to the real standing of the parties in interest, and this, it seems to us, is necessary in order to give effect to the plain terms of the statute.

Now, applying the principles of these and other decisions to the facts of this case—

When the stock in the Helena National Bank was pledged the authority given by Ashby was to sell it. This authority was specifically set out in the note, Exhibit "I" (Rec. 13) in the following language:

> "****and I hereby give the said Merchants Loan & Trust Company of Chicago, its assign or assigns, authority to sell the same or any part thereof, etc."

This language cannot be construed into an authority to sell except for cash or its equivalent, and when, on May 17th, 1895, the defendant exchanged this stock so pledged, for the stock in the First National Bank it was guilty of a conversion, and the pledgor thereafter had the option to affirm the sale and assert by proper proceedings, an ownership in the property received in exchange, so long as it continued to remain in the hands of the defendant, or to repudiate the sale and sue for damages.

In *Williamson* v. *Barry,* 8 Howard, 295, the court by Justice Wayne, says:

> "Sale is a word of precise legal import, both at law and in equity. It means a contract between parties to take and to pass rights of property for money which the buyer pays or promises to pay to the sellor for the thing bought or sold."

In *Griggs* v. *Day,* 136 New York, 152, Griggs had deposited with one Garrison promissory notes of the Wheeling & Erie R. R. Co., amounting to nearly two million dollars. Upon re-organization of the Company Garrison, without the knowledge of Griggs, exchanged the notes for second mortgage bonds of the Company. The court said:

> "It would make no difference whether we consider these notes as having been exchanged for the

bonds or having been used in payment for the bonds. In either, however, Garrison was at most guilty of a conversion of them..*..*..* * so we reach the conclusion as to all the notes, that Garrison by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong."

In *Beckley* v. *Munson,* 22 Conn., 298, Beckley had conveyed to the defendant personal property consisting of railroad stock, coal, iron ore, wood, etc., as security for an indebtedness of about seventeen thousand dollars. By the conveyance the defendant was "authorized to sell and dispose of, or manufacture in whole or in part, as he should see fit." Subsequently, the defendant exchanged a portion of the property for twenty shares of railroad stock. Upon these facts the court by Waite, Justice, says:

"By the terms of the original conveyance the defendant for the purpose of raising money to pay the debts assumed by him, was authorized to sell and dispose of the personal property assigned to him as he saw fit. Under that authority he had a right to sell upon credit if necessary, and had a loss arisen upon such sale, fairly made, it might undoubtedly have been charged to the plaintiff."

And again:

"It was the duty of the defendant under these circumstances, with all reasonable diligence to convert property into money to pay off the debt. Instead of doing so, the committee find him some six months after, disposing of $2,000,000 of the assets in the purchase of railroad stock. * * * * This, in our opinion, was not a faithful execution of the trust as contemplated by the parties when the bond was given."

And in *Edwards* v. *Cotteral et al*, 43 Iowa, 194, it is said:

> "A mortgage of a chattel with power of sale by the mortgagee upon default in payment, confers upon him no right to barter the mortgaged property, or to dispose of it otherwise than for cash. Sale means at all times a contract between parties to pass rights of property for money, which the buyer pays or promises to pay to the sellor."

We might multiply authorities upon this proposition, but deem it wholly unnecessary.

If then, Ashby or his assignor (who may have succeeded to his rights) had the option to ratify his illegal sale by the defendant and claim the stock in the First National Bank, subject only, to the lien of the defendant for the balance, if any unpaid, upon the Ashby note, or to treat the transaction as a conversion of the original stock and sue the defendant for its value, it must be admitted that until such election had been exercised, and the ownership of the stock in the First National Bank claimed by Ashby or his assignee, the defendant was, as against the First National Bank itself, or its creditors, the real owner of the stock in controversy. Otherwise, said stock must be treated during that interval as being without an owner.

Such a condition seems to have been anticipated in the Pauly case, as the court says,

> "It may be suggested that if the pledgee is not held liable as a shareholder in respect to the shares of stock standing in its name as pledgee, then no one is liable to assessment as the owner of such stock, but, it is a mistake to suppose that Havermale and Collins ceased to be shareholders for the purposes of liability imposed by Section 5151. *They remain, notwithstanding the pledge, the actual owners of the stock.*" (The italics are ours.)

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We think it may be fairly inferred from this language, that the decision in that case holding the pledgee not liable turned upon that point.

Can it be said that in this case either Ashby or his assignee remained or ever became the actual owners of stock in the First National Bank? We apprehend that if the plaintiff in error had sued them for this assessment instead of the defendant in error, they would have answered "we are not now and never were the owners of such stock." And that the record in this case which states, "All the facts pertinent to the issue" would have fully and conclusively sustained such a defense.

But it is said by defendant in error "the exchange of the shares of the Helena National Bank for shares of the First National Bank was not a foreclosure or termination of the pledge. It was merely a substitution of the latter in place of the former—a formal matter of which no one could complain, and which in no wise, affected the rights of the parties. The certificates for one hundred and twenty shares in the First National represented exactly the same thing, only in better form, which was before represented by the certificates for one hundred and fifty shares in the Helena National Bank. The change was not of ownership or interest, but of evidence of ownership or interest."

Unfortunately for the position of the defendant in error, the courts do not take this liberal view of such transaction.

Where bonds were pledged as security to the payment of a debt, it has been held that a tender by the pledgee of different bonds, although there were the same number, of the same face value and of the same issue of those

pledged, did not relieve the pledgee of responsibility for damages in the absence of an affirmative showing that he had, at all times since the date of the pledge, held in his hands the exact number and equivalent value of the bonds pledged. In other words, if the pledgee chanced to hold at the time of the pledge, other bonds of the exact character of those pledged, the commingling of the two was not a conversion, and if subsequently he disposed of a portion of the bonds thus held by him, and at such disposition either inadvertently or otherwise, disposed of a portion of those pledged, it did not amount to a conversion providing the original number were at all times retained by him, subject to be redeemed by the pledgor.

Stewart v. *Biglers Assignees*, 98 Pa. St., 80.

But even in such a case, if it appears that the pledgee had actually disposed of the bonds pledged, and such others as were held by him, he cannot afterward purchase bonds of the same issue and of equivalent value, and by tendering them to the pledgor, acquit himself of liability for a conversion.

We know of no case, and think it may safely be said that no case can be found where a pledgee has been permitted to change the character of his security without the consent of the pledgor, and compel the pledgee to receive such substituted securities in lieu of the original pledge.

It is again urged on the part of the defendant in error that the consolidation of the Helena National Bank with the First National Bank was accomplished by operation of law, and that the holders of stock in the Helena National had no option but to consent to the exchange.

In the very able and exhaustive argument of counsel

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for the defendant in error in the court below, no authority was cited to support this contention. We, therefore, assume that none such can be found. No part of the National Banking Act or any other Act, State or Federal, authorizes any such action on the part of bank officers. Indeed, if the National Banking Act contains any provision affecting a question of this sort, it would seem, by implication at least, to provide for the protection of the interest of the minority stockholders in such cases. The Act of July 12, 1882, authorizes any National Banking Association to extend its period for twenty years from the date of the expiration of its corporate existence, by amendment of its Articles of Association, such amendment to be authorized by the written consent of the shareholders owning not less than two-thirds of the capital stock. It further provides, that if any shareholder does not assent to such amendment, upon notice in writing to the directors, he shall be entitled to receive from the Association the value of his shares, and provision is made for an appraisal of such value.

There is no special provision made for consolidation of National Banks, but, it is provided that banks organized under this Act may go into liquidation by a vote of two-thirds of its shareholders, and inferentially, perhaps, authorizes liquidation by such vote for the purpose of consolidation with another bank. It seems to us that the fair inference from these provisions of the Act is that a single stockholder may withdraw from the bank when any radical change is contemplated, either by extension of the period, or by liquidation, or consolidation, and compel the purchase of his stock at its appraised value.

The law is well settled that corporations other than National Banking Associations, cannot consolidate with

other corporations, or sell their property to other corporations, and accept in exchange the stock in such other corporation, and force such stock upon dissenting stockholders.

Cook on Corporations, 4th Ed. Sec., 671, and authorities there cited.

Assuming then, that the defendant in error had the right and power to have withheld its approval of the plan of consolidation and decline an exchange of stock as proposed, what would have been the result, and what effect would it have had upon the parties in interest and the questions now involved?

It must be apparent that such refusal on the part of the defendant would not have prevented the consolidation, as the statement of facts shows that more than two-thirds of the shareholders had consented to the consolidation before the defendant in error took any part in it. See letter of Edgerton under date of December 22, 1894 (Rec., 24); hence, the consolidation at that time was assured. The parties interested in such consolidation would have been compelled to purchase the one hundred and fifty shares held by the defendant in error. At that time this stock was worth eighty cents on the dollar of its face value, or twelve thousand dollars ($12,000), because of the reduction of the capital stock of twenty per cent. (Rec., 24.)

The letter of Mr. Edgerton (pages 14-18 of the record), shows conclusively that the business of the Helena National was upon a prosperous basis. We invite attention particularly, to that portion of the statement contained in said letter, on page 15, where it shows an increase of deposits from two hundred thousand dollars

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on August 1, 1893, to $682,330.06 on September 5, 1894, and an increase of cash and exchange on hand for the same period, of $17,000 to $224,063.47, so that at the last date the bank had an available reserve of thirty-three per cent. And again, on page 16, it shows an increase in the same period, of individual depositors from 227 to 547; and that while the general banking business of Helena had shrunk from a million and a half to two millions of dollars in the preceding two years, the volume of business of the Helena National had increased nearly half a million, and in that connection there appears a marked contrast between the condition of the Helena National and the First National, as during the same period the business of the First National had shrunk about a million dollars. And again, on page 17, Mr. Edgerton says, that instead of reducing the capital of the bank from $500,000 to $400,000, his judgment was to charge off $200,000 and put $100,000 or $150,000 into surplus and undivided profit account.

These statements of the then president of the Helena National Bank, being the same person who in May, 1895, received from the defendant in error its stock in the Helena National, standing as they do as a part of the agreed statement of facts, undisputed and in no manner qualified, seems to justify the conclusion that at that time the stock was of the value named, and that had the defendant in error refused to accept the exchange it would have received a consideration sufficient to have liquidated the debt of Ashby.

It may be said that this is a matter with which we have no concern in this case, but when it is considered that had such sale of the stock been made, the one hundred and twenty shares of stock in the First National,

received by the defendant in error, and by its direction placed in the name of P. C. Peterson on the books of the bank, would have continued the property of Edgerton or some of the parties interested in the consolidation scheme, and thus, upon the insolvency of the First National Bank which followed nine months later, the receiver would not have been obliged to meet the question here presented, and would not have been required to scour the country to find an owner for this stock, but, would have proceeded directly to enforce the assessment against Edgerton or such of his associates as held the particular stock in controversy, it becomes a question of vital and controlling interest.

IV.

THE FACT OF AN UNLAWFUL SALE HAVING BEEN ESTABLISHED, THE BURDEN OF PROOF IS UPON THE DEFENDANT IN ERROR TO SHOW SUBSEQUENT RATIFICATION BY A PERSON AUTHORIZED TO RATIFY SUCH SALE, OR ANY OTHER MATTER IN AVOIDANCE OF LIABILITY.

The argument of this point calls for an analysis and discussion of the opinion of the Circuit Court of Appeals.

First. The court says:

> "If the change was made (referring to the exchange of stock), without Ashby's consent, it was nevertheless, a matter of election on his part whether he would ratify it, and in the second place it is not shown by the statement of facts, that the consolidation and substitution of the one stock for the other were not affected by his authority, or were not afterward ratified by him." (Rec., 39.)

The first premise would doubtless, have been correctly stated if Ashby had still retained the equity of redemption, but as has been shown, on July 26, 1893, he had conveyed all his interest to Ford (Rec., 10), and ratification by him would not have, in any manner, affected the transaction.

The second premise must be separated in two parts.

THE FIRST, THAT AN EXCHANGE WITHOUT ASHBY'S AUTHORITY WAS NOT SHOWN, AND THE SECOND, THAT THE EXCHANGE WAS NOT RATIFIED BY HIM.

The first, is not supported by the record. The authority given by Ashby is found in the collateral note (Rec., 14), and is "to sell the same," not to barter or exchange; and is the only authority shown by the statement of facts to have been given; and that no other had been given appears conclusively from the letter of Orsen Smith, vice-president of the defendant, transmitting the old stock for exchange, under date of September 24, 1894, seventeen months after Ashby had transferred his interest to Ford; wherein the question is asked: "Where can Mr. Ashby be found," and the statement, "In a matter of this kind we would like very much to have him consent to our action." (Rec., 24; Ex. G.)

The answer of Edgerton, president of the Helena National Bank, under date of December 31, 1894 (Rec., 25), says, "Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence on anything as he has apparently literally gone all to pieces," and no further correspondence is shown prior to the final exchange May 17, 1895, which was accomplished by the letter of defendant in error. (Rec., 27.) While the stipulation shows that all the correspondence relating to the stock, so far

as it is material, is set out in and attached as exhibits to the statement of facts (Rec., 12), and the same shall be taken and considered as all the facts concerning the transaction. (Rec., 28.)

We submit with confidence that it is shown that the exchange was without Ashby's consent.

Coming then, to the second proposition, the learned court seems to regard the burden of proof as upon the plaintiff in error to negative ratification by Ashby. This is certainly a mistaken view of the law. The rule is thus announced by GREENLEAF:

> "In many actions of tort there are many possible justifying circumstances, self defense, etc., but it would be both contrary to experience to assume that one of them was present, and unfair to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances which would, if existing, leave him without a claim, are put upon the defendant to prove." Greenleaf on Evidence, 16th Ed. Sec., 14, w., Pg. 97.

In *Great Western R. R. Co.* v. *Bacon*, 30th Ill., 353, the Supreme Court of Illinois say:

> "It is not easy to lay down a general rule by which it may be readily determined upon which party the burden of proof lies, when a negative is averred in the pleading. Each case must depend upon its peculiar characteristics, and courts must apply practical common sense in determining the question. When the means of proving the facts are equally within the control of each party then the burden of proof is upon the party averring the negative; but when a party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and

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reasonable that the party thus in the possession of the proof should be required to adduce it, or upon his failure to do so we must presume it does not exist, which of itself establishes a negative."

In *Royall's Administrators* v. *McKenzie et al.*, 25 Ala., 363. It appeared that Royall had made an assignment for the benefit of creditors to the defendants. The defendants had taken from one of Royall's debtors land in satisfaction of the debt. Suit was brought to recover from the assignees the amount of such debt. On page 370, it is said:

"The answer of McKenzie alleges that Royall, who was absent at the time the land was taken in discharge of the debt, on his return was advised of the arrangement and was perfectly satisfied with it. Had this allegation been sustained by the evidence there would be no question that the complainant, as the representative of Royall, could not charge McKenzie with the debt. But these facts are not established, and the answer is not proof, such circumstances being matter in avoidance which requires evidence *aliunde* to sustain it."

In *Spaulding* v. *Bank*, 9 Barr, 28. Suit was brought to recover the amount of a promissory note. It appeared that the debtor had deposited bank bills with a trustee as security for the debt, and the same were not accounted for. In the trial court it was held that the defendant who claimed the benefit of the collaterals, must show that they had been collected or lost by carelessness of the bank before he could claim the benefit of them in reduction of the indebtedness. The Supreme Court, however, takes a different view of the question, and says:

"It was easy for the bank to give an account of what was done with them. Good faith requires that they should do so, and the law will hold them to it."

In *Hunt* v. *Douglas*, 22 Vermont, 129, plaintiff had delivered a horse to his brother, I. K. Hunt, to be used and sold. He exchanged that horse with Lee for another horse and $15 to be paid to the plaintiff, with an agreement that the title to the horse was to remain in the plaintiff until the $15 was paid. Lee subsequently, and without paying the $15, exchanged the horse for another and still another. The latter was attached on a debt against Lee. This suit was to recover possession of the horse from the constable having it under attachment. It was held, title did not vest in the plaintiff until the exchange was ratified, and there being no evidence of ratification plaintiff could not recover.

The same doctrine was recognized in *Strong* v. *Adams*, 30 Vermont, 221, where a debtor left property with a creditor as security. The creditor exchanged it for other property, the latter was attached as the property of the creditor. The Supreme Court decided that a ratification by the original owner of the pledged property must affirmatively appear, but that the bringing of suit by the debtor immediately after the exchange of property was such ratification.

Second. The court further says:

> "Nor that they were not effected by the authority of, or afterward ratified by his assignee Ford. Neither is it shown that the assignee under the law, and by order of the court, and by the consent of Ashby, did not have authority to consent to the substitution."

This proposition must be governed by the rules of evidence last announced.

The statement does show conclusively that the exchange of stock was made without the authority of Ford,

as, in his letter to defendant in error under date of January 4, 1896, eight months after the exchange was effected (Rec., 27) Ford says, "Kindly let me know if you still hold this stock and whether one hundred and fifty shares of the Helena National Bank or one hundred and twenty of the First National Bank, which number of shares would be issued you in case of transfer. And there is absolutely no evidence to qualify this letter, or the presumption raised thereby.

And a subsequent ratification by Ford, if it would be available at all as a matter of defense, must be proved by the defendant in error. There is no hardship in this. Such proof, if it existed, was in the hands of the defendant in error. The plaintiff in error could have no knowledge of the fact, and the failure of defendant in error to produce such evidence, raises a conclusive presumption that it did not exist.

Mantony v. *Reilly*, 184 Ill., 203.

The question of the authority of the assignee to have ratified the exchange seems to us to be a question of law.

Prior to the year 1895 there existed in the State of Montana no statutory law relating to assignments for the benefit of creditors. In the Code of 1895 provision is made for such assignment, Section 4510 reading as follows:

> "An insolvent debtor may in good faith execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter, subject, however, to the provision of this code, relative to trusts and to fraudulent transfers, and to the restriction imposed by law upon assignments by special partnerships, by corporations or by other specific classes or persons."

But the act contained absolutely no provision with respect to the manner of sale, and no such provision is to be found in any subsequent enactment; hence, Ford was with respect to the estate of Ashby, governed by the common law principles regulating this subject. He was but the trustee of the property, and in discharging his trust had no greater or different powers than are conferred by common law upon trustees generally. Such transfer is made in trust to apply the assigned property or the proceeds thereof to the payment of the assignor's debt.

In *In re Barnes,* 140 New York, 468, it is said:

> "The law neither authorizes nor permits the assignee to make any investment of the moneys received by him in his trust capacity. It is his duty promptly to convert the asset's of the insolvent's estate into money, to keep the funds securely, and at the time and in the manner required by law to distribute them among the creditors and other persons entitled to them."

In Chambersberg Saving Fund Association Appeal, 76 Pa. St., 203, a Saving Fund Association holding the title to lands as a collateral for a debt due them, assigned for the benefit of creditors. The assignee being informed that the debtor had no title to the lands, without proper investigation took from him other securities and reconveyed the land to him. The debt being lost, it was held "that the assignee was liable for its amount on the ground of supine negligence."

If an assignee sells on credit, he does so at his peril. If any loss results, he is personally liable.

Miller v. *Holcomb,* 9 Gratt (Va.) 665.

> "An assignee is not authorized to barter or exchange property."
>
> Burrill on Assignments, 505.

In *Page* v. *Olcott,* 28 Vermont, 469, it is said:

> "An assignee or other trustee who barters trust property, should be charged with the value of the property and interest thereon."

Discussing the policy of the law, the court says:

> "Cases may be supposed, where it might be to the interest of all concerned to allow the trustee to barter or exchange trust property, yet this is aside from the trust and would open the door for fraud and the law will not sanction it."

From these authorities the conclusion is reached that Ford as assignee of Ashby had no power to consent to the exchange of the stock of the National Bank for stock in the First National Bank in the absence of the affirmative showing that he was specifically authorized by the deed of assignment to exercise such power.

TO RENDER RATIFICATION EFFECTIVE AS A DEFENSE IT MUST APPEAR THAT SUCH RATIFICATION WAS MADE BEFORE THE RIGHTS OF THIRD PARTIES HAD INTERVENED.

This question is discussed at length in *Johnson* v. *Johnson,* 31 Fed., 700. The opinion on page 703 sums up the authorities quoted, in this language, which we submit, correctly states the rule of law which ought and does govern all such cases:

> "These cases are not directly in point on the question under consideration which is undecided; but they recognize the true distinction as to the application of the retrospective effect of the ratification of unauthorized acts of an agent by his principal. That distinction is, there must be some mutuality between the ratifying principal and the third party who is to be affected by his ratification, else the ratification will not have a retrospective effect as against the interest of such third party."

This statement of the learned judge who delivered the opinion, seems to be founded in reason, and is especially applicable to the facts in this case, by the transfer of the stock in the First National Bank of Helena to Peterson, the agent of the defendant in error, as we have shown heretofore in this argument; the rights of the bank or anyone who might thereafter represent it as receiver, to proceed against any former owner of the shares for assessments, was lost, and as we have also shown, to create a liability on the part of Ashby or his assignee, required some mutuality; and agreement on the part of Ashby or his assignee to be treated as the real owner of the stock.

This principle is also recognized in *Parmerlee* v. *Simpson,* 5 Wallace, 81.

Moritz v. *Hoffman et al.,* 35 Ill., 553.
Wittenbrock v. *Bellmer,* 57 Cal., 12.
Wood v. *McCain,* 7 Ala., 800.
Norton v. *National Bk.,* 14 So. Rep., 872.
Kempner v. *Rosenthal,* 81 Texas, 12.
Pollwell v. *Cohen,* 32 Ohio St., 525.
Conner v. *Littlefield,* 79 Texas, 77.

And in *Fiske* v. *Holmes,* 41 Me., 444, where it is said:

> "As the absence of previous or contemporaneous assent renders the ultimate validity of a transaction contingent, it being doubtful whether the necessary ratification will ever be given or not; it necessarily follows that the subsequent assent does not relate back so as to prejudice a party whose conduct has been guided by the transaction as it actually occurred."

And in *McMahan* v. *McMahan,* 13 Pa. St., 381, where it is said:

> "By such ratification the doings of the agent be-

come the acts of the principal; unless, indeed, it might operate to over-reach and defeat rights acquired *bona fide* by third persons, or subject them to some loss or penalty to which they would not otherwise be liable."

And in *Taylor* v. *Robinson et al.,* 14 Cal., 396, the plaintiff had given to one Dunlap general authority to do all acts necessary in and about the collection and securing of a debt owing by one Johnson; Dunlap took a bill of sale of certain property in liquidation of the indebtedness. Shortly afterward the sheriff, at the instance of a creditor of Johnson levied upon the property so sold. Taylor brought this suit against the sheriff and Robinson for taking the property which he alleges he was the owner of. It was held by the court that the general authority to collect and secure the debt was not sufficient to authorize the purchase of the property, and with regard to the ratification says:

"Now, although the general rule is that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, yet, this doctrine is not universally applicable. Thus, if a third person, acquire rights after the act is done, and before it has received the sanction of the principal, ratification cannot operate retrospectively so as to over-reach and defeat those rights."

Third. The court further says:

"It was alleged in the declaration, and the plaintiff in error therefore had the burden of proof that the Trust Company purchased and became the owner of one hundred twenty shares of the capital stock of the said First National Bank of Helena. To establish that averment it was necessary to show that the original shares confessedly held as collateral were wrongfully converted into the new stock without the consent of the pledgor; but, the fact is not so stated in the agreement; the letters and other circumstances all indicate the contrary."

We concede that the burden of proof was upon the plaintiff in error to establish the fact alleged, that the Trust Company purchased and became the owner of the stock in controversy, and insist that such fact is fully established when we have shown an exchange of the original shares for such stock in a manner not authorized by the contract of pledge, and that it was incumbent upon the defendant in error to establish by affirmative proof, ratification of the illegal sale, or any other fact which might be urged in avoidance. That this was not done we have shown by the record.

Fourth. The last conclusion of the court is, "The general finding of the court is conclusive of the question."

This suggestion is not only not supported by the authorities, but is directly contradictory of the rule announced by this court in *Supervisors* v. *Kennicott,* 103 U. S., 554, heretofore referred to herein, where the court by Mr. Chief Justice Waite says:

> "It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiff, but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiff, on the case as stated * * * There was no issue but of law, and that the court found for the plaintiff."

In conclusion we submit, that under no rule of law and upon no theory of the facts, as stated, can it be held that either Ashby or his assignee, Ford, are and were at the time of the commencement of this suit, the legal owners of the one hundred and twenty shares of the stock in the First National Bank of Helena upon which the assessment is sought to be recovered.

That when corporate stock has been issued and paid for so far as the corporation issuing it is concerned, and passed beyond the control of said corporation, no condition of fact can be conceived that will divest such stock of ownership and leave it without a legal owner.

That if the decision of the Circuit Court of Appeals shall be affirmed, the stock in controversy will be in that anomalous position.

The National Banking Act clearly contemplates that the shares in national banks shall at all times, until final liquidation, be subject to assessment for the benefit of the creditors of such bank, and to hold that the defendant in error is not liable for the assessment sued upon, will not only do violence to the letter and spirit of the law, but will pave the way for unscrupulous and dishonest holders of shares in such national banking associations to avoid the responsibility imposed upon them by law.

We therefore, insist that the judgment of the Circuit Court of Appeals is manifestly wrong and should be reversed.

Respectfully submitted,

DELEVAN A. HOLMES,
Attorney for Plff. in Error.

W. E. MASON,
Of Counsel.

No. 290. 67.

Br. of Jewell for Def.

Office Supreme Court U. S.
FILED
APR 24 1901
JAMES H. McKENNEY,
Clerk.

Filed April 24, 1901.

IN THE

Supreme Court of the United States,

OF THE OCTOBER TERM, A. D. 1900.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA,
Plaintiff in Error,
vs.
THE MERCHANTS LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS,
Defendant in Error.

Error to the United States Circuit Court of Appeals for the Seventh Circuit.

290.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JOHN N. JEWETT,
For Defendant in Error.

BARNARD & MILLER, PRINT.

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In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The parties to this litigation have not changed their relations to each other since the action was commenced, and may, therefore, be referred to as plaintiff and defendant without danger of confusion. Reference to the record will mean the printed record.

The action was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division, against P. C. Peterson and The Merchants' Loan and Trust Company, to recover an assessment made by James H. Eccles, as Comptroller of the Currency, upon stockholders in the First National Bank of Helena, Montana, upon an averment in the declaration (Rec., 2) that Peterson "appeared by the books of

the said The First National Bank of Helena, Montana, to be the owner and holder of one hundred and twenty (120) shares of stock in said bank, which said stock, however, was held by him for the sole use and benefit of the defendant, The Merchants Loan and Trust Company * * * said Peterson being one of its employes."

Afterwards the action was dismissed as to the defendant, Peterson (Abst., 3), and by leave of court an amended declaration was filed (Rec., 4) against The Merchants Loan and Trust Company alone, which after reciting the failure and suspension of The First National Bank of Helena, the appointment and qualification of the plaintiff as receiver, the making of the assessment of $100 per share by the Comptroller upon the shareholders of the bank, " Avers, that the Merchants Loan and Trust " Company, a corporation, at some time between the " 1st day of December, 1894, and the 1st day of June, " 1895 (the exact date being to plaintiff unknown), *pur-* " *chased and became the owner* of 120 shares of the " capital stock of the said First National Bank of Hel- " ena, Montana, of the par value of one hundred dol- " lars each, and continued to be and was at the time " said bank suspended and ceased to do business, *the* " *real owner of the same.* But *in order to evade the* " *responsibility* imposed by law upon the stockholders " in said bank, caused said shares to be placed upon the " books of said bank in the name of P. C. Peterson, " one of its employes, in whose name said shares ap- " peared on the said books at the time of said failure." Then follows an averment that Peterson was not personally responsible, and that notice of the assessment and demand for its payment were served upon Peterson with the knowledge of the defendant, and the conclusion of the

declaration is that *by reason of the premises* The Merchants Loan and Trust Company, *as owner*, is under legal obligation to pay $12,000 as an assessment upon the stock of The First National Bank of Helena which stood at the time of the suspension of said bank in the name of Peterson.

To this declaration these pleas were filed (Rec., 6):

1st. Nil debit.

2d. A denial that the defendant, between the 1st day of December, 1894, and the 1st day of June, 1895, *or at any other time*, purchased or became the owner of 120 shares of the capital stock of The First National Bank of Helena, *or any shares* of the capital stock of said bank.

3d. That the 120 shares of the First National Bank of Helena are and at all times have been held in the name of said P. C. Peteron, as trustee, and as security for the payment of the principal and interest of a note for $12,000, dated April 15, 1893, and payable to the order of defendant on August 16th, after date thereof, made and executed for value received by one Shirley C. Ashby to the defendant, and bearing interest, after maturity, at the rate of 7 per cent. per annum, which note has ever since been held and owned by defendant, and on which only a partial payment had been made.

Issue was joined on the first and second pleas, and to the third plea a special replication was filed (Rec., 7), averring that the 120 shares of stock in the First National Bank of Helena, mentioned in the plea, were not held by said Peterson as security for the payment of the note referred to, *but the defendant was and still is the real owner of said stock.*

By these pleadings, the issue to be determined is sharply defined, and that issue was a question of fact, viz: was the defendant the real owner of the 120 shares of stock within the meaning of the National Banking Act? If it should be said in the loose language of some courts and many writers upon judicial subjects, that it was a *mixed* question of law and fact, it may be pertinently replied that the question of fact must in every such case be first determined, before the theories of law can be properly invoked for the determination of results.

The case was submitted to the District Court upon a stipulation of the parties named in the record; "a statement of facts" which was used on the trial without objection or exception and is embodied in the record as a "*bill of exceptions*." The stipulation was the only evidence. The District Court (Rec., 8) found the issues for the defendant, and rendered judgment against the plaintiff for costs. The finding of the court was a general one, and no opinion or reasons of the court were reduced to writing and filed in the case. On the same day the plaintiff filed a motion for a new trial (Rec., 9), the sole ground for the motion being, that "The court erred in finding the issues "in favor of the defendant and against the plaintiff." The overruling of the motion, with an exception thereto by the plaintiff, is embodied in the order for judgment. (Rec., 8.) These proceedings took place on the 18th of April, 1899.

No objections or exceptions were taken on either side to the stipulation of the parties, which is designated in the record "statement of facts." or to anything which that stipulation contained, and on the 13th day of May, 1899 (Rec., 9), "the statement of facts * * * was allowed as a bill of exceptions."

Upon a record made up of the orders and proceedings above referred to, and the stipulation of the parties designated "statement of facts," as a bill of exceptions, the plaintiff by petition took the case to the Circuit Court of Appeals for the 7th Circuit, assigning for error (Rec., 29):

1st. The court erred in finding the issues in favor of the defendant.

2d. The court erred in overruling motion of plaintiff for a new trial.

3d. The court erred in entering judgment in favor of the defendant and against the plaintiff.

Upon the hearing of the cause in the Circuit Court of Appeals (Rec., 40) the judgment of the District Court was affirmed, and from that judgment the present writ of error is prosecuted.

Whether or not there is anything in this assignment of errors which this court can and will consider, is a matter to be presented hereafter; but it will be well to understand the contents of the stipulation or "statement of facts" before that discussion is entered upon.

That stipulation, by whatever name it may be described, consists of two parts: 1st. Substantive facts, which are admitted as such, and 2d, letters and other memoranda attached as exhibits, the genuineness and competency of which as evidence only are admitted, but the effect of which is to be determined by the court. The actual stipulation is found on pages 9 to 13 of the record. The exhibits admitted merely as evidence, are set out in the fifteen pages immediately following.

An analysis of the statement shows these facts, viz: That on April 15, 1893, the defendant loaned to Shirley

C. Ashby, of Helena, Montana, then President of the Helena National Bank, $12,000, for which amount it took his promissory note, payable on the 16th day of August next following. That as security for the payment of said note Ashby assigned in blank and delivered to defendant a certificate representing 150 shares of the capital stock of the Helena National Bank. That the note was in form commonly known as a collateral note and authorized the sale of the security upon default in payment of the note. That so far as known to defendant, the Helena National Bank was then in good financial condition, That before the maturity of the note and on July 26, 1893, Ashby made an assignment for the benefit of his creditors, to Robert S. Ford of Grant Falls, Montana, and amongst the property assigned by him was a certificate for 150 shares of the capital stock of the Helena National Bank, described as "then held by the "Merchants Loan and Trust Company *in pledge.*"

About the time of his assignment Ashby resigned the presidency of the Helena National Bank, and E. D. Edgerton was chosen to fill the vacancy. The cashier, Frank Baird, continued in that office until the summer of 1894, and was then succeeded by George F. Cope (Rec., 10). Meanwhile the conditions, so far as they related to the note and collateral, remained unchanged. The note of Ashby was wholly unpaid, and the certificate for 150 shares of stock in the Helena National Bank was held without change by the defendant.

The stipulation as a statement of fact admits (Rec., 10, 11) that "Later in the year 1894, it was proposed "by the parties in interest, at Helena, to consolidate the "Helena National Bank with the First National Bank "of Helena, of which the defendant had notice, and in

"response to a letter from Edgerton, President of the "Helena National Bank," dated December 22, 1894 (Rec., 11), the defendant forwarded to him the certificates for 150 shares of stock in the Helena National Bank which it held as collateral security, and the letter, enclosing said certificate, was received and acknowledged.

An understanding of the situation as it then was, requires that the letters relating to it should be here set out. They are Exhibits E, F, G and H, of the Stipulation (Rec., 23-4-5).

EXHIBIT E.

THE MERCHANTS' LOAN & TRUST COMPANY,

CHICAGO, Dec. 17th, 1894.

Geo. F. Cope, Esq., Cashier, Helena, Mont.

DEAR SIR: Your favor of the 13th inst. duly received. We will in future send all our collections to the First National Bank of Helena. Thanks for the printed circular regarding the consolidation of the Helena National Bank with the First National. We would like to know how we stand in this matter. You know we hold 150 shares of the Helena National Bank stock as collateral to a note made by S. C. Ashby. What is it necessary for us to do? How many shares of the First National Bank stock do we receive for the 150 shares of the Helena National? Is there a market for the new stock? Please give us what information you can, that we may proceed correctly, and oblige

Yours, truly,

ORSON SMITH, *V. Pt.*

EXHIBIT F.

FIRST NATIONAL BANK,
Designated Depository of the United States,
Capital and Surplus, $1,000,000.

HELENA, Montana, Dec. 22, 1894.

Orson Smith, Vice-President
Merchants' Loan & Trust Co., Chicago, Illinois.

DEAR SIR: Your favor of Dec. 17th to our Mr. Cope received. I never knew exactly how your matter with Mr. Ashby stood, and am pleased to have the information. The new stock in the consolidated deal will be transferred on the same basis as held by the stockholders in the Helena National; but it is only fair to call your attention *to the fact* that during the last three months the Comptroller of the Currency, at our request, owing to Mr. Ashby's peculiar methods of business and large indebtedness to the bank, has reduced the capital of the Helena National from $500,000 to $400,000. Consequently your 150 shares of the Helena National stock will be re-issued to you in the same amount less twenty per cent.

Inasmuch as we want to have matters as unanimous as possible, would it not be well for you to send in your stock and have it transferred to your own name or whatever name you may elect, and send us your proxy to vote at the meeting in January regarding the consolidation?

We have considerably more than enough stock represented now to carry the matter, so you may know it is no selfish motive that prompts this suggestion, but rather for your own interest.

You understand Mr. Ashby is under an assignment and Lord knows what not, and he has proven to be anything but a desirable party in *my* (any?) capacity of life, that I know of.

You ask, if there is a market for the new stock. I suppose you understand just how the West is at this time. We have no great amount of surplus money. I apprehend that there will be a market for the new stock, but just at the present time I don't know that I could refer you to any one. You understand that there are lots of western parties who would dispose of their western holdings, *at any price;* and the truth is that the West is not quite able to take them all at once. Any information, that you may desire in the future, I shall be most happy to supply if it is within my power.

Respectfully,

E. D. EDGERTON,
President Helena Natl. Bk.

EXHIBIT G.

THE MERCHANTS' LOAN & TRUST COMPANY.

CHICAGO, Dec. 26, 1894.

E. D. Edgerton, Esq.,
President of Helena National Bank,
Helena, Mont.

DEAR SIR: I enclose herewith certificates of stock for 150 shares, for which please send me two certificates of fifty shares each, and one for twenty shares in the name of P. C. Peterson. Mr. Peterson's address is, Care of this Bank, and we will be glad to furnish you proxies if you will enclose us blanks for that purpose.

Where can Mr. Ashby be found? In a matter of this

kind we would like very much to have him consent to our action.

Yours truly,

ORSON SMITH, *V. Pt.*

EXHIBIT H.

FIRST NATIONAL BANK,
DESIGNATED DEPOSITORY OF UNITED STATES.
CAPITAL AND SURPLUS $1,000,000.

HELENA, Montana, Dec. 31, 1894.

Merchants' Loan & Trust Co., Chicago, Illinois.

GENTLEMEN: Yours of Dec. 26th received with enclosure as stated. Agreeably to your instructions we have transferred the enclosed stock, and return you herewith three certificates of the Helena National Bank stock, being numbered respectively 356-7-8 for fifty shares each in the name of P. C. Peterson.

In your letter you instruct us to issue two fifty and one twenty certificates. Undoubtedly this was under the assumption of the retirement of one hundred thousand dollars I spoke of in my letter. While we have the order, we have never acted on it by making the formal change, inasmuch as about that time we arranged this consolidation and thought it useless to bother our people twice.

We have issued this stock just as it stands on our books. But, under the new consolidation, the new issue of the First National Bank will be as you suggest, one hundred and twenty shares.

Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence in anything, as he has apparently literally all gone to pieces.

Respectfully.

E. D. EDGERTON,
President of Helena National Bank.

The stipulation or statement of facts then recites (Rec., 11), that "subsequently and prior to April 22, 1895, the consolidation of the Helena National Bank with the First National Bank of Helena was consummated with the consent and approval of the comptroller of the currency, Hon. James H. Eccles," the basis of said consolidation being an allowance to the stockholders in the Helena National Bank eighty per cent. of the face value of their stock in the Consolidated Bank, which took the name of the First National Bank of Helena, and that "on or about May 17, 1895, the certificates representing one hundred and fifty (150) shares of the capital stock of the Helena National Bank standing in the name of P. C. Peterson "were with the consent and under the direc- "tion of the defendant surrendered, and new certificates, "representing one hundred and twenty (120) shares in "the new or Consolidated Bank were issued to said "Peterson in their place." Exhibit I (Rec., 25), is the letter requesting the exchange. The stipulation then says: "These last named certificates have ever since "been and are now in the possession and control of the "defendant and are held by it, *in the same way and for "the same purpose, as the certificates for one hundred "and fifty (150) shares of the capital stock of the Helena "National Bank were originally held, except as the con- "ditions may have been changed by the facts hereinbe- "fore stated,* BUT THAT NEITHER THE DEFENDANT NOR "THE SAID PETERSON *ever took any part in the manage- "ment of either of said banks or participated in the ad- "ministration of their affairs.*" The *italics* of the foregoing quotation from the stipulation, as well as others, are not found in the record. They simply indicate what I regard as *controlling facts* in the present case.

There is also, by the stipulation admitted into the record, as evidence, some correspondence between the defendant and Mr. Ford the assignee of Ashby. Exhibits, "J," "K," "L," & "M." (Rec., 26, 7 & 8.) This correspondence was opened so far as the record shows on October 14, 1895, and ended January 7, 1896. It shows that the assignee of Ashby recognized the right of the defendant to make the changes in the registration of the stock, held by it as collateral security, and the exchange of the shares in the Helena National Bank to the shares in the First National Bank of Helena. Inferentially, and if presumptions can be indulged in, it shows that the receiver had exchanged the unincumbered shares in the Helena National Bank, which came to him as assignee, into shares in the Consolidated Bank, for he says (Exhibit L., Rec., 27), in a letter to the defendant, dated January 4, 1896. "I desire to sell and convert into cash, "in the early spring, the remaining assets of S. C. Ashby "which consist of unimproved real estate in Helena and "forty-eight shares of the First National Bank Stock of "Helena. Before the last dividend is declared, I would "like for you to make disposition for (of ?) the collateral "you hold on the $12,000 loan to Mr. Ashby or entrust "it to me to sell for your benefit. I am now trying to "get an offer on the forty-eight shares I hold. * * * "Kindly let me know if you still hold this stock, and "whether 150 shares of the Helena National Bank or "120 of the First National Bank which number of shares "would be issued to you, in case of transfer.

"Yours truly,

"R. S. FORD, *Assignee.*"

The stipulation further states, as a matter of agreement (Rec., 11, 12), that "all the communications be- "tween the defendant and said banks and their officers, "in any manner relating to said stock and stock certifi- "cates *since* the certificates for one hundred and fifty "shares of stock in the Helena National Bank first came "into the possession of the defendant in the manner and "for the purposes herein stated, have been by corre- "spondence, and the letters and document hereinabove "referred to and made exhibits hereto are an embodi- "ment of all that correspondence with said banks and "their officers and with the assignee of said Shirley C. "Ashby, so far as the same is material *as evidence* on "the hearing of this cause. And the said exhibits are, "and each of them is hereby made a part of this state- "ment."

The remainder of the stipulation contains admissions of formal matters, necessary to the right of the plaintiff to institute and maintain an action as the receiver of a national bank against the stockholders in such bank for the collection of an assessment made by the Comptroller of the Currency against the stockholders in case of the bank's insolvency. About such formal matters there is no controversy. Amongst the matters so admitted is the fact, that Peterson was a confidential employe of the defendant, and that he is without pecuniary responsibility, that the defendant is a corporation with banking and trust powers organized under the laws of Illinois, and doing business in Chicago, that it is accustomed to loan money on stocks in other corporations as collateral security, but for various reasons and amongst others, the possible incurring of a stockholder's liability, it never permitted the stock so held by it to be transferred and registered in its own

name. In this connection the stipulation says, (Rec., 12): "The reasons for this custom were various. Amongst "them may be mentioned *the fact*, that the certificates "are more readily dealt with when so held; that the de- "fendant as a banking corporation, is unwilling to ap- "pear as a stockholder on the books of other corpora- "tions and may not properly assume that position; *that* "*the holding of stock as collateral security is not in fact* "*an ownership of it*, and that in some cases there is a "liability attached to an *apparent, nominal holding of* "*stock*."

Immediately following the above is the admitted fact, that "the defendant is still the holder of the note of the "said Shirley C. Ashby for $12,000, dated April 15, "1893, upon which two partial payments *only* have been "made, both by the assignee of said Ashby, as shown "on the back of said note hereto attached, viz: one for "$1,680 made December 12, 1895, and one for $960, "made October 6, 1896."

It is believed that the foregoing is a fair statement of the case as presented in the courts below, and in both courts the judgment was in favor of the defendant.

Assignment of Errors.

The errors assigned in this court are as follows:

1st. The court erred in holding that the exchange by the defendant in error of stock in the Helena National Bank, held by it in pledge for stock in the First National Bank of Helena, if made without the consent or authority of Ashby, the pledgor, was nevertheless a matter which might subsequently be ratified by him or his assignee, and that such subsequent ratification would relieve the defendant in error of the responsibility of such exchange.

2d. The court erred in holding that the burden of proof was upon the plaintiff in error to establish the fact that the original shares, confessedly held as collateral were wrongfully converted into the new stock without the consent of the pledgor.

3d. The court erred in finding that the agreed statement of facts does not show the wrongful conversion by the defendant in error of the original shares into the new stock without the consent of the pledgor.

4th. The court erred in holding as a matter of law that the letters and other circumstances all indicate that the original shares were not wrongfully converted into the new stock, without the consent of the pledgor.

5th. The court erred in holding as a matter of law that the general finding of the District Court is

conclusive of the question of the wrongful conversion of the original shares by the defendant in error.

6th. Said judgment is erroneous, because it is in favor of the defendant in error, and against the plaintiff in error; whereas, upon the whole record it should have been in favor of the plaintiff in error."

These assignments of error, taken as a whole, invite this court to enter upon an independent examination of the evidence, for the purpose of determining for itself whether or not it would, sitting as a trial court, have reached the same conclusion of fact that was arrived at by the judge of the District Court, before whom the case was originally heard without a jury. The several assignments differ in form, and as they mark the boundaries of the investigation which this court is asked to make, they properly outline the questions which are open to discussion.

Brief and Argument.

I.

The first assignment of error questions the power of Ashby or his assignee to ratify the exchange of the 150 shares of stock, admittedly held by the defendant as collateral security, into the 120 shares of stock of the consolidated bank, known as the First National Bank of Helena. This, so far as it contains a proposition of law, is inadmissible. The universal rule on this subject is, that whatever may be originally authorized, is capable of complete and effective ratification. The power to ratify is commensurate with the power to authorize. There are no special conditions in this case which interfere with the operation of the general rule. The court will note that the exchange into the stock of the First National Bank was made in May, 1895, and that the failure of the bank occurred in September, 1896.

II.

The second assignment of error assumes, as a legal conclusion, that a change of the stock of the Helena National Bank into the stock of the First National Bank of Helena, without the consent of Ashby was, unless explained, a wrongful conversion which made the defendant absolute owner of the stock of the consolidated bank, and liable as a stockholder, to assessments for payment of its debts. Even if the assumption could be admitted,

in the absence of other evidence, then the mere fact that the change was made, the evidence in the case renders it wholly unimportant, and the reason is, that all the evidence is stipulated into the record. It comes in by agreement and without exception. No special responsibility for it rests upon either party. Presumably the trial court considered it all, and weighed it all in arriving at ultimate results. The mere naked fact of change was not before the court; the fact was there with all its attendant circumstances, which the trial court was bound to consider and presumably did. But if we go back to the pleadings, we find the declaration charges that the defendant became the purchaser and owner of the 120 shares of the stock of the First National Bank of Helena and was such owner at the time of the suspension of the bank. This the pleas deny—upon such an issue, where is the burden of proof as to every material fact? It might be admitted that, if the defendant's name appeared upon the books of the bank as a stockholder, the production of the books would make a *prima facie* case against the defendant, and the burden of proof would then be changed; but when the charge of ownership must be made good, if made good at all, through a series of transactions, out of which the inference of ownership is alone to be derived, who has the burden of establishing the fact by a preponderance of evidence? A man is not presumably guilty of murder or larceny, because he is charged with and indicted for the crime. Nor is a man liable to the penalties and obligations of an owner of shares in a national bank unless he is affirmatively shown to be such owner. That he is charged as owner is no evidence of the fact of ownership. We must not forget the elements of legal learning in our anxiety to

reach a desired conclusion. If there has been any departure from such elementary principles of the law and *practice* of the law, in the judgment of any court, the wisdom of it may be open to criticism when it is shown. I should not be willing to claim the benefit of it as a discoverer.

III.

The third, fourth and fifth assignments of error reach the same point by different routes. The substance of them is, if there is any substance to them, that there was no evidence before the trial court which, properly considered, in connection with the reasonable inferences therefrom, justified the finding in favor of the defendant, and that, for that reason, the Circuit Court of Appeals erred in affirming that finding and the judgment entered in accordance therewith.

Two questions are raised by these assignments of error (the sixth assignment may be wholly disregarded) which seem to be the only ones deserving of consideration. They involve the duties and responsibilities of the trial court, and the powers and responsibilities of the Circuit Court of Appeals and of this court, in the exercise of their appellate and supervisory jurisdiction, and may be included in one proposition, viz.:

The duty and responsibility of determining question of fact in cases at law are, by law, devolved upon the trial court, and there is no authority in this court (and this applies to the Circuit Courts of Appeal) to examine the testimony in any case and from it make a finding of ultimate facts.

Such seems to be the settled rule as announced by the authorities.

In *Reed* v. *Stapp*, 52 Fed. Rep., 641, Judge JENKINS, speaking for the Court of Appeals for the Seventh Circuit (p. 644) says:

"This finding is challenged as not sustained by the evidence, and we are urged so to declare. *We have no authority to do that.* Treating the opinion as a special finding, we are only at liberty to consider whether the facts found in law support the judgment. The findings of the trial court upon questions of fact are conclusive—we are not permitted to examine the evidence to ascertain whether the findings of fact be justified. (*Copelin* v. *Insurance Co.*, 9 Wall., 461–467; *The Abbottsford*, 98 U. S., 440–443; *Zeckendorf* v. *Johnson*, 123 U. S., 617.) The review permitted extends only to the question whether the facts found support the judgment rendered. (*Tyng* v. *Grinnell*, 92 U. S., 467.)"

The same doctrine is announced in the case of *Phipps* v. *Harding*, 70 Fed. Rep., 468–470, and the opinion of the Court of Appeals in the present case is to the same effect.

Further citations from the decisions of the Circuit Court of Appeals are not deemed necessary.

In the case of *Lancaster* v. *Collins*, 115 U. S., 222–225, the conclusive adjudication of this court upon this question seems to be authoritatively stated by Mr. Justice BLATCHFORD, in the following language:

"This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff, on the question of variance, or *because there was no evidence to sustain the verdict rendered.*"

In the above case, there was a trial by jury, and the opinion is, therefore, properly limited in its application to cases in which the question of fact is determined by the verdict of a jury. But in the case of *Lehnen* v. *Dickson*, 148 U. S., 71, the question came before the court in a broader way. In that case, as in this, a jury was waived and the cause submitted to the court.

Before stating the conclusions of that case, it is proper to refer again to the fact, that the evidence and the only evidence in the present record is introduced by stipulation of the parties; that the stipulation is not an *agreed case*, nor a substitute for a finding of *ultimate facts*. It was rather a waiver of the formal presentation and identification of evidence, presumably within the control of the parties. Especially is this true of the letters and other papers which are attached as exhibits, and have a bearing upon the entire transaction, the effect of which the stipulation did not pretend to give, and was left as a matter for the determination of the court. In this, the case is in all its features like the case of *Knights of Pythias* v. *English*, 94 Fed. Rep., 369, in which the Court of Appeals for the Eighth Circuit said: "*It is the settled rule of the Supreme Court and the* "*Circuit Courts of Appeal that when a case is tried by a* "*federal judge without a jury the sufficiency of the evi-* "*dence to sustain the general findings of fact cannot be* "*considered by the Appellate Court.*"

It is also proper to call attention to the exact words of the body of the stipulation, which are (Rec., 11): "These last named certificates" (the certificates for 120 shares in the First National Bank of Helena), "*have* "*ever since been and are now in the possession and con-* "*trol of the defendant, and are now held by it in the*

" *same way and for the same purpose as the certificates*
" *for one hundred and fifty (150) shares of the capital*
" *stock of the Helena National Bank were originally*
" *held, except* as the conditions may have been changed
" by the facts hereinbefore stated; but that neither the
" defendant nor the said Peterson ever took any part in
" the management of either of said banks, or participated
" in the administration of their affairs."

From this specific admission the proper conclusion is, that the defendant held the certificates for 120 shares of the capital stock of the First National Bank of Helena as collateral security, precisely the same as it held the certificates for 150 shares in the Helena National Bank, and this construction is supported by the *further admission* (Rec., 12), in the following language:

" The defendant is still the holder of the note of the
" said Shirley C. Ashby for $12,000, dated April 15,
" 1893, upon which two partial payments only have been
" made, both by the assignee of said Ashby, as shown
" upon the back of said note hereto attached, viz: One
" for $1,680, made December 12, 1895, and one for
" $960, made October 6, 1896."

As the fact of those payments is a part of the stipulation it is perhaps immaterial that they do not appear upon the copy of the note set out as Exhibit 1. They were on the exhibit as attached to the stipulation, but were by mistake omitted in the transcript made by the clerk of the District Court.

Both of these payments were made long after the shares of stock in the Helena National Bank had been changed into certificates of stock in the First National Bank of Helena, and time enough elapsed for everybody in inter-

est to be charged with notice of the fact that the change had been made, and yet the payments were made, the *first*, seven months and the *second*, seventeen months after the exchange, by the assignee of Ashby to the defendant as a rightful creditor of Ashby for the full amount of the note.

Returning now to the case of *Lehnen* v. *Dickson*, (148 U. S.), we find it was a case submitted to the trial court without a jury, and that there was on the hearing in the trial court "*no special finding af facts and no agreed statement of facts.*" This appears on page 72. The only formal difference between that case and the present one, which is observable, bearing upon the question now under consideration, is, that in the Lehnen case the testimony was introduced in the ordinary way, and in the present case it came in by stipulation. The stipulation admits certain facts; it also admits as evidence certain letters and documents as proper testimony which the court should consider, simply as evidence, without attempting to give to them and their contents any construction or evidential effect. They, in connection with the facts admitted, were to be considered by the court in the determination of the *ultimate facts* of the case. It is no matter what a stipulation may be called. Its influence must be limited to what it contains. The manner in which legitimate testimony is brought before the court is immaterial unless *the manner* is made the special subject of objection and exception. The stipulation of what is merely evidence into a case does not make the stipulation an agreed case, or an agreed statement of facts. For purposes of illustration merely, it may be stated that counsel for the plaintiff and I never could, in this case, have agreed upon what are

called *ultimate facts*, whilst it was easy for us to agree upon some facts and upon the admissibility of certain letters and documents, *as evidence*, the effect of which should be determined by the court in arriving at its conclusion as to the "*ultimate facts*," to which the law should be applied. In this view of the present case I may be excused for introducing here some extracts from the opinion of this court in the case of *Lehnen* v. *Dickson*, which was without dissent.

At page 72 (U. S., 148), Mr. Justice BREWER, speaking for the court, says:

"There is no special finding of facts, and no agreed "statement of facts. Obviously, therefore, inquiry in "this court must be limited to the sufficiency of the com- "plaint and the rulings, if any be preserved, on questions "of law arising during the trial. Sections 648 and 649, "of the Revised Statutes, while committing generally "the trial of issues of fact to a jury, authorize parties to "waive a jury, and submit such trial to the court, add- "ing that '*the finding of* the court upon the facts, which "may be either general or special, shall have the same "effect as the verdict of a jury.' *But the verdict of a "jury settles all questions of fact.* As said by Mr. Jus- "tice BLATCHFORD in *Lancaster* v. *Collins*, 115 U. S., "222, 225: 'This court cannot review the weight of "evidence, and can look into it only to see whether there "was error in not directing a verdict for the plaintiff on "the question of variance, or because there was no evi- "dence to sustain the verdict rendered.' The finding of "the court, to have the same effect, must be equally con- "clusive, and equally removed from examination in this "court the testimony given on the trial." *Insurance Co.* v. *Folsom*, 18 Wall., 237; *Cooper* v. *Omohundro*, 19

"Wall., 65. Further, section 700 provides that 'When "an issue of fact in any civil case in a Circuit Court is tried "and determined by the court, without the intervention of "a jury, according to section 649, the rulings of the court "in the progress of the trial of the cause, *if excepted to at "the time, and duly presented by a bill of exceptions*, may "be reviewed by the Supreme Court upon a writ of error, "or upon appeal; and when the finding is special, the re- "view may extend to the sufficiency of the facts found to "support the judgment.' Under that, the rulings of the "court in the trial, *if properly preserved*, can be reviewed "here, and we may also determine whether the facts as "specially found support the judgment; *but if there be "no special findings*, there can be no inquiry as to wheth- "er the judgment is thus supported. *We must accept the "general finding as conclusive upon all matters of fact, "precisely as the verdict of a jury. Martinton* v. *Fair- "banks*, 112 U. S., 670.

"It is true, if there be an agreed statement of facts "submitted to the trial court and upon which its judgment "is founded, such agreed statement will be taken as the "equivalent of a special finding of facts. *Supervisors* v. "*Knenicott*, 103 U. S., 554. Doubtless, also, cases may "arise in which, without a formal special finding of facts, "there is presented a ruling of the court, *which is dis- "tinctly* a ruling upon a matter of law, and *in no manner* "a determination of facts, or of inferences from facts, "in which this court ought to and will review the ruling. "Thus in *Insurance Co.* v. *Tweed*, 7 Wall., 44, where "on the argument in this court counsel agreed that cer- "tain recitals of facts made by the trial court in its opin- "ion or 'reasons for judgment,' as it was called, were the "facts in the case, and might be accepted as facts found

" by the court, it was held that, as they could have made " such agreement in the court below, it would be accepted " and acted upon here, and the facts thus assented to would " be regarded as the facts found or agreed to upon which " the judgment was based; and upon an examination it was " further held that they did not support the judgment, " and it was reversed. But still, as was ruled in *Flan-* " *ders* v. *Tweed*, 9 Wall., 425, this court is disposed to " hold parties to a reasonably strict conformity to the " provisions of the statute prescribing the proceedings " in the case of a trial by the court without a jury; *and* " *no mere recital of the testimony*, whether in the opin- " ion of the court or in a bill of exceptions, can be deemed " a special finding of facts within its scope. *Norris* v. " *Jackson*, 9 Wall., 125. See also the case of City of " New York, 147 U. S., 72, in which the rule, as appli- " cable to suits in admiralty, was reviewed and similar " conclusions were reached."

After considering certain features of the case then before the court, the opinion (p. 77) proceeds:

" But the burden of the statute is not thrown off sim- " ply because the witnesses do not contradict each other, " and there is no conflict in the testimony. It may be " an easy thing in one case for this court, when the testi- " mony consists simply of deeds, mortgages, or other " written instruments, to make a satisfactory finding of " the facts, and in another it may be difficult, when the " testimony is largely in parol, and the witnesses directly " contradict each other. *But the rule of the statute is* " *of universal application.* It is not relaxed in one case " because of the ease in determining the facts, or rigor- " ously enforced in another, because of the difficulty in " such determination. *The duty of finding the facts is*

" *placed upon the trial court. We have no authority to* " *examine the testimony in any case, and from it make* " *a finding of the ultimate facts.* Neither in this case " can that be said to be wholly an inconsequential mat- " ter upon which the witnesses differ. It may not be of " controlling importance, yet it bears largely on the ques- " tion *of the good faith* of Lennen in taking the lease " from Kempinski. With reference to the language of " Judge THAYER, it is obvious that no such significance as " is claimed can be given to the words 'after stating the " facts as above.' Reading the prior statement, it would " seem to be only a succinct recital of the material testi- " mony in the case. *Norris* v. *Jackson*, 9 Wall., 125."

In *Martinton* v. *Fairbanks*, 112 U. S., 670 (a case referred to with approval in the opinion from which the above quotations are made), this court, speaking by Mr. Justice WOODS, and without dissent, said (p. 671):

" During the trial a bill of exceptions was taken which " simply set out all the evidence in the case and closed " as follows: 'Which was all the evidence offered in said " causes; on which evidence the court found for the plain- " tiff in the sum of $11,209, and entered judgment ac- " cordingly, to all of which said defendant then and there " excepted. And, as said facts aforesaid do not appear " of record, this bill of exceptions is prepared, and we ask " that the Judge may sign and seal the same, and it is " done accordingly.' "

" There was no demurrer to the declaration or other ex- " ception to the sufficiency of the pleadings, no exceptions " to the rulings of the court in the progress of the trial, " in the admission or exclusion of evidence, or other- " wise, no request for a ruling upon the legal sufficiency or

"effect of the *whole evidence*, and there was no motion in "arrest of judgment. The only matter presented by the "bill of exceptions which this court is asked to review, "*arises upon the exception to the general finding by the "court for the plaintiff, upon the evidence adduced at the "trial.* The defendant in error insists that, upon this "state of the record, no question of law is presented which "the court here can review.

"We think this contention is well founded. The pro- "visions of the acts of Congress which relate to the trial "of issues of fact by the court are found in the act of Sep- "tember 24, 1789, 'An act to establish the judicial courts "of the United States.' * * * The provision in the "act of 1789 is reproduced in § 1,011 of the Revised stat "utes, as follows: 'There shall be no reversal in the Su- "preme Court or in any Circuit Court upon a writ of error "* * * for any error of fact." The provisions of the "act of 1865 are reproduced in §§ 649 and 700 of the Re- "vised Statutes, as follows: Sec. 649. "Issues of fact "in civil cases in any Circuit Court may be tried and de- "termined by the court without the intervention of a jury, "whenever the parties or their attorneys of record file with "the clerk a stipulation in writing waiving a jury. The "finding of the court upon the facts, which may be either "general or special, shall have the same effect as the "verdict of a jury."

After further citing the provisions of the statute, the opinion (p. 672) proceeds:

"§§ 649 and 700 were first fully construed by this court "in *Norris* v. *Jackson*, 9 Wall., 125. The court in "that case, speaking by Mr. Justice Miller, laid down "the following propositions: '(1.) If the verdict be the

" general verdict, only such rulings of the court *in the* " *progress of the trial* can be reviewed as are presented " by bill of exceptions, or as may arise on the pleadings. " (2.) In such cases *a bill of exceptions cannot be used* " to bring up the whole testimony for review any more " than in a trial by jury. (3.) That if the parties desire " a review of the law involved in the case, they must " either get the court to find a special verdict, which " raises the legal propositions, or they must present to " the court their propositions of law and require the " court to rule on them. (4.) Objection to the admis- " sion or exclusion of evidence, or to such ruling on the " propositions of law as the party may ask, must appear " by bill of exceptions.' These propositions have been " persistently adhered to by this court. Thus, in *Miller* " v. *Insurance Co.* 12 Wall., 285, 297, it was said: 'The " finding of the court, if general, cannot be reviewed " in this court by bill of exceptions or in any other " manner.'

" In *Insurance Company* v. *Folsom*, 18 Wall., 237, the " court said: ' Where the finding is general, the parties " are concluded by the determination of the court, ex- " cept in cases where exceptions are taken to the rulings " of the court in the progress of the trial. * * * Where " a case is tried by the court without a jury, the bill " of exceptions brings up nothing for revision except " what it would have done had there been a trial by " jury."

After citing various other authorities, the opinion further says (p. 173):

" The proposition that the general finding of the court " in this case is open to review is in direct opposition to

" the rulings of the court in the cases cited. The plaint-
" iff in error seeks to make the question whether the
" evidence set out in the bill of exceptions justified the
" finding by the court for the plaintiff, on the issue of
" fact raised by the pleadings. This is, in defiance of
" the decision of this court that it can not be done, an
" attempt upon a general finding to bring up the whole
" testimony for review by a bill of exceptions.

" The theory of the plaintiff in error seems to be that
" the general finding in this case, like a general verdict,
" includes questions of both law and fact, and that, by
" excepting to the general finding, he excepts to such
" conclusions of law as the general finding implies. But
" § 649, Revised Statutes, provides that the finding of
" the court, whether general or special, shall have the
" same effect as the verdict of a jury. *The general ver-*
" *dict of a jury concludes mixed questions of law and*
" *fact*, except so far as they may be saved by some ex-
" ception which the party has taken to the ruling of the
" court upon a question of law. *Norris* v. *Jackson*, *ubi*
" *supra*. But the plaintiff in error has taken no such
" exception. By excepting to the general finding of the
" court, it is in the same position as if it had submitted
" its case to the jury, and, without any exceptions taken
" during the course of the trial, had, upon a return of
" the general verdict for the plaintiff, embodied in a bill
" of exceptions all the evidence, and then excepted to the
" verdict because the evidence did not support it."

Other parts of the opinions of this court above referred to might be added, but the quotations made are deemed sufficient for the purposes of the present case. There are here no exceptions to any of the proceedings had in and before the trial court. There was no request for

special findings to be made by that court. There was no motion before the trial court which challenged in any way the sufficiency of the evidence to justify a finding in favor of the defendant, or which asked the court peremptorily to find in favor of the plaintiff. The only exception was a general one to the conclusions of the court. Under the rulings of this court set forth in the cases above referred to, and the authorities therein cited, there was nothing left upon the record, as made in the trial court, for the Circuit Court of Appeals to reconsider or review; and, therefore, this court, according to the rule which it has conclusively established, has no authority to re-examine the evidence involved in the general finding of the trial court as to the facts; and, therefore, has no basis upon which to review the findings upon questions of law.

Further authorities upon this question are not regarded as necessary, for the law as thus established has not been departed from so far as I am advised.

IV.

IF THE OBJECTIONS TO THE AUTHORITY OF THIS COURT IN THE PRESENT CASE TO REVIEW AND CONSTRUCT FOR ITSELF A THEORY OF THE FACTS, SHOULD NOT BE SUSTAINED, THEN IT IS INSISTED THAT, UPON THE MERITS, THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, ON THE GROUND THAT THE DEFENDANT NEVER WAS THE OWNER BY PURCHASE OR OTHERWISE, OF THE 120 SHARES OF STOCK OF THE FIRST NATIONAL BANK OF HELENA, REFERRED TO IN THE PLEADINGS, OR LIABLE TO AN ASSESSMENT AS SUCH, WITHIN THE MEANING OF THE NATIONAL BANKING ACT AS CONSTRUED BY THIS COURT.

It is unnecessary to spend any time over the proposition that the 120 shares of stock referred to never stood upon

the books of the bank in the name of the defendant. It is not pretended that they ever did, and as a consequence of this, that technical cause or source of liability, which rests upon the mere fact of registration or representation, is entirely withdrawn from consideration.

The question of ownership is always a question of fact, and the responsibilities imposed by law upon ownership do not attach until the fact of ownership has been established. The intention of parties dealing with property and property rights enters largely into the fact of ownership. The concurrent intention of the parties converts an absolute deed into a mortgage, or a bill of sale into a pledge. It is the agreement and mutual understanding which fixes their relations to the subject-matter of their business transactions, *and in the absence of fraud, third parties cannot change those relations for their own advantage.* The transaction between the defendant and Ashby, by which the former received the stock of the Helena National Bank in pledge as collateral security for an actual loan of money, was morally and legally unobjectionable. It was recognized in the assignment made by Ashby, in the following Ju[illegible] exactly as it was made, viz: *as a pledge of the stock.* The assignee Ford, was, therefore, by the very instrument of assignment which he held, advised of the relations of the defendant to the certificate of shares in the Helena National Bank. He cannot claim, nor can the plaintiff claim ignorance of those relations. They are also recognized by the two banks and by the assignee in their correspondence with the defendant down to the latest item of that correspondence which the record contains; and this applies as well to the 120 shares of the stock of the First National Bank of Helena, which by consolidation absorbed the Helena National

Bank as to the 150 shares originally pledged by Ashby. As has already been shown Ashby resided at Helena, Montana, and the 150 shares of the Helena National Bank stock stood in his name upon the books of the bank, whilst all the preliminary steps for the reduction of the stock of that bank and for the consolidation of the two banks were in progress. Presumably he had notice of those proceedings, and as a registered stockholder he was the party to be served with notice respecting those proceedings up to the very time of their practical completion; for such changes in bank organizations are not made without notice to registered stockholders. Whatever Ashby's personal disabilities or failings may have been, as shown in the letters of Edgerton heretofore referred to (and they certainly seem to have been bad enough) he would still have been entitled to notice of those changes, and if he or any one claiming under him had any disposition, either from bad or good motives, to resist the proposed changes with respect to the 150 shares of stock held by the defendant as collateral, he should have notified the defendant who was two thousand miles away from the scene of those transactions, against submitting to the changes which were in contemplation. No such notice was ever given. No steps of any kind in recognition of the changes were ever taken by the defendant until it was advised that the transactions had been practically agreed upon and only formal action was required to make them complete. The defendant was left to act upon its own judgment of the situation and upon the understanding clearly expressed in the letters of Edgerton, the president of the banks, that the changes had practically been made *with the consent and under the author-*

ity of the controller of the currency. All parties in interest outside of the defendant, who held the stock as pledgee, seem to have consented to the changes which were in fact made. There does not appear from the record to have been any dissent of any stockholder in the National Bank of Helena to those changes. The Helena National Bank, although its stock was impaired, was yet presented to the defendant as a solvent institution, and improving in its conditions. By the reduction of its capital, directed by the controller of the currency, the 150 shares which the defendant held as a collateral was practically reduced to 120 shares of the stock of that bank. Of the First National Bank of Helena, prior to the consolidation, no complaint had ever been made, so far as the record shows, and the two banks were consolidated with the consent of their stockholders generally but *without the participation of the defendant, or of Peterson,* in whose name the shares then stood, upon the basis of the par value of their shares respectively, the reduction in the capital stock of the Helena National Bank being at that time deemed a fixed fact. It is not readily perceived what fault the defendant committed under such circumstances, in surrendering the shares in the Helena National Bank which it held as collateral, and taking in exchange therefor the certificates representing 120 shares in the consolidated bank, which by the judgment of all parties in interest was the representative value of the Helena National Bank stock in the consolidation. The change was a mere formal one, so made and so understood. The changes which had been made at that time, rendered the certificate of shares in the Helena National Bank ineffectual for many purposes for which such certificate in going institutions are deemed available. The exchange

was necessary to give currency to whatever there was of value in the old certificates. It was a thing authorized, if not commanded, to give full effect to what the law, the ministers of the law and the parties in interest had actually done. The new certificate was the old thing in better and more available form. The exchange was neither a sale nor a conversion in any proper signification of those terms. The defendant held the original certificates for a special purpose, with full authority to represent them and make them available for that purpose. What it did, it did for the benefit and protection of its security, and nothing more, and it may be safely added, as a matter challenging belief, that it held the new certificates in the same way and for the same purpose that the old ones were held, and that all parties in interest so understood it, as shown by the correspondence between them. The defendant never made any claim of absolute ownership in the certificates. If Ashby or his assignee had deemed it advisable at any time to redeem the certificates by paying the debt for which they had been pledged, it is not within the range of possibility that the defendant would have pretended that the changes through which the security had passed had resulted in any change in the relation of the parties to the security itself, or that any court would so have held if the question had been submitted to it. The defendant simply wanted its money. Its correspondence bears no other construction. It never purchased this stock in any of its forms, and never executed the power of sale contained in the collateral note, which it certainly would have done if it had intended to acquire the stock in real ownership.

If this analysis of the situation is the right one, and this is confidently insisted upon, then the only other ques-

tion to be considered is, can a party holding certificates of shares in a national bank simply as a pledgee or as collateral security for a debt owing to him, and in whose name the stock never has been registered upon the books of the bank, be held to the liabilities of an actual stockholder under the provisions of the National Banking Act? The decisions of this court, as I understand them, answer this question in the negative. That such a holder of share certificates is not the real owner of the shares is a proposition which need not be discussed separately, as it is disposed of by the same authorities which will be referred to upon the main question.

It may be seriously doubted, in view of the more recent decisions of this court, whether the decision in the case of *National Bank* v. *Case, receiver*, 99 U. S., 623, would be repeated to-day under the same conditions. The fact that the bank, in that case, caused the transfer to be made to Waldo, one of its clerks, within a few hours after the shares had been registered in its name, *for the purpose* of avoiding the liability of a stockholder, is of no consequence in itself, under more recent decisions, if it had not already incurred the liability of a stockholder by causing the stock to be registered in its own name. The transient and, probably, accidental registration of the stock in the name of the bank, injured no one and conferred no additional rights and should not have entailed unexpected responsibilities. The holder of national bank *stock as security* is not bound to assume the responsibility of an actual stockholder and may rightfully evade it. It was the fact, however, in that case, that the National Bank took upon itself the apparent ownership of the stock, by causing it to be registered in its own name, and that mere fact determined the result

in that case. There is no such fact in the present case, and, therefore, it is not necessary for my client's protection that I should have or enter into any further controversy with that judgment. I may, however, call attention to another questionable statement contained in the opinion of Mr. Justice STRONG, to the effect that the holder of shares as collateral security, who permits himself to appear upon the books of the corporation as a stockholder, thereby *releases* the former owner from his liability as a stockholder. It has since been held, and upon better consideration of the provisions of the National Banking Act, as will be hereafter seen, that the holder of shares in a national bank as security simply, is not the real owner, and that the pledgor of the shares remains such real owner so long as the pledge is in force, and that simple change of registration does not relieve the real owner from the statutory liability as a shareholder. But, however this may be, the case at bar is readily distinguishable by the absence of the substantial fact which determined the judgment in the case of the *National Bank* v. *Case;* for neither the stock of the Helena National Bank, nor the stock of the First National Bank of Helena, was ever registered or appeared upon the books of either bank, in any way, in the name of the defendant.

The case of *Anderson, receiver*, v. *Philadelphia Warehouse Company*, 111 U. S., 479, may be referred to as analagous, in all important features, to the case now before the court, and the results of it as decisive against the claims of the plaintiff. The opening paragraph of the opinion in that case states in clear terms the law applicable to and controlling in this case, as well as in that. It says:

" It is well settled that one who allows himself to ap-
" pear on the books of a national bank as an owner of its
" stock is liable to creditors as a shareholder, whether
" he be the absolute owner or a pledgee only; and that,
" *if a registered owner acting in bad faith*, transfers
" his stock in a failing bank to an irresponsible person,
" for the purpose of escaping liability, or if his transfer
" is colorable only, the transaction is void as to cred-
" itors. *National Bank* v. *Case*, 99 U. S., 628. *Burton*
" v. *Johnson*, 107 U. S., 251. *It is, also, undoubtedly*
" *true, that the beneficial owner of stock* registered in
" the name of an irresponsible person may, under *some*
" *circumstances*, be liable to creditors as the real share-
" holder, *but it has never, to our knowledge, been held*
" *that a mere pledgee of stock is chargeable where he is*
" *not registered as owner.*"

At page 483 the opinion further says:

" There is in this case no evidence of actual fraud or
" bad faith. *The Warehouse Company never was the*
" *owner of the stock in question, and never held*
" *itself out as such.* The transfer of Kern and Blumer
" & Co., was only by way of pledge, and the Company
" was bound to return the stock whenever the debt, for
" which it was held, should be paid. From the verdict
" of the jury, under the instructions of the court, it must
" be accepted as a fact, that the Company never con-
" sented to a transfer of the stock to its name, or to that
" of its president, and it is undisputed that, for seven
" years before the failure of the bank, and at least five
" years before its embarrassments were known to the
" Company, or the public, the stock had been standing,
" with the assent of Kern, Blumer & Co., and the officers

"of the bank, in the name of McCloskey or Ferris. Dur-
"ing all that time, neither the registered holders, nor the
"Warehouse Company, claimed any dividends or in any
"way acted as shareholders. On the contrary, either Kern
"or Blumer & Co., took the dividends, and to all intents
"and purposes controlled the stock." (In the present case there were no dividends, and except as stated nothing was ever done with the stock by any one). "There
"was no concealment on the part of the Warehouse
"Company, and no effort to deceive. It had possession
"of the certificates which represented the stock, with
"full power to control them for all the purposes of its
"security, but there was never a time, from the date of
"the original transfer by Kern on the books, until the fail-
"ure of the bank, that it was or pretended to be anything
"else than a mere pledgee. Those who examined the
"list of shareholders would have found the name of Mc-
"Closkey or Ferris as the registered holder of 450 shares.
"There was nothing on the books of the bank to con-
"nect them or either of them with the Warehouse Com-
"pany as a shareholder. If inquiries had been made and
"all the facts ascertained, it would have been found that
"either *Kern or Blumer & Co. were always the real*
"*owners of the stock*, and that it had been placed in the
"name of the persons whose names appeared on the
"registry, not to shield any owner from liability, *but to*
"*protect the title of the company as a pledgee.* * * *
"The avowed purpose of both transfers was to give the
"company the control of the stock for the purposes of
"its security, *without making it liable as a registered*
"*stockholder.* To our minds there was neither fraud
"nor illegality in this. *The company perfected its*
"*pledge without making itself liable as an apparent*

" *owner.* Kern or Blumer & Co. *still remained the* " *owners of the stock,* though registered in the name of " others, and pledged as collateral security for their debt. " * * * *The security of the Warehouse Company* " *was perfected without imposing on the company a* " *stockholder's liability.* All this was done in good " faith, when the bank was in good credit and paying " large dividends, and years before its failure or even its " embarrassment. So far as the company was concerned, " *the transfer was not made to escape an impending* " *calamity, but to avoid incurring a liability it was un-* " *willing to assume, and which it was at perfect liberty* " *to shun.*"

In the case of *Pauly* v. *State Loan & Trust Company,* 165 U. S., 606, all the cases of importance theretofore decided in this court bearing upon the liabilities of shareholders in national banks, are considered and carefully analyzed by Mr. Justice Harlan, and various conditions are stated with conclusions appropriate thereto, the last one being as follows (p. 619):

" That if one receives shares of the stock of a national " banking association as collateral security to him for a " debt due from the owner, with power of attorney au- " thorizing him to transfer the same on the books of the " association, and, being unwilling to incurr the respon- " sibilities of the shareholder as prescribed by the statute, " causes the shares to be transferred on the books to " another, under an agreement that they are to be held " as security for the debt due from the real owner to the " creditor, the latter acting in good faith, and for the " purpose only of securing the payment of that debt " without incurring the responsibility of a shareholder,

"*he, the creditor, will not*, although the real owner may "be treated as a shareholder within the meaning of sec- "tion 5,151."

The case of *Robinson* v. *Southern National Bank*, recently decided in this court and reported in the advance sheets of "All Opinions of the Supreme Court of March 15, 1901," may properly be referred to as illustrative of acts of active interference by the holder of shares of stock in national banks as pledgee and for purposes of security only, affecting the status or ownership of such shares *without incurring thereby* the liability of a stockholder. The facts in that case were widely different from those here presented, but the principle underlying the decision of the case would seem broad enough for the full protection of the present defendant. It may be added here that it is impossible to charge the defendant in this case with any fraudulent act or improper intention. The mere mistake, if there was one, in the exercise of an apparent authority, coupled with an interest, may furnish cause for setting aside the act and imposing such damages as have naturally resulted therefrom; but it would be cruelty in courts to impose upon the accident of a mistake the punishment of intentional and premeditated wrong-doing. It cannot be claimed upon this record that the defendant ever intended to become the owner of the stock in either of the Helena banks, or that it ever acted in such a way as to indicate to others that it so intended. It did nothing which can be regarded as legally inconsistent with the continuous holding of the certificates of shares as collateral security only, and the two courts to which the case has already been submitted have so decided. It is respectfully submitted that no reason can be shown why these decisions should be reversed.

V.

It is certainly proper, if not necessary, to make some reference to the brief and argument of counsel for plaintiff in this case, which has been just received. It may be said of it preliminarily that the *whole argument assumes* as a matter of fact fully established that the defendant held the shares of stock in the consolidated First National Bank of Helena as a purchaser and real owner. This assumption is in direct conflict with the conclusions of the trial court as the logical result of the entire evidence in the case. The general finding of the trial court necessarily involved the question of the real ownership of the 120 shares of the capital stock of the First National Bank of Helena. The general finding could not have been made without a determination of that question, and that question was settled and determined by the evidence before the court. That determination was a necessary precedent to the judgment in favor of the defendant. To treat the case now from the standpoint that that general finding amounted to nothing, would be to abandon the entire case as it now stands, and begin a trial of it *de novo* in this court. If the premises assumed by plaintiff's counsel were to be admitted, a different argument on the part of the defendant would be justified. It is the premises of the counsel that are denied, and not his conclusions of law derived from such premises. This is illustrated in every point which the counsel has made, and taking them in their order, he asserts as his first point that "the 120 shares of stock were held by P. C. Peterson "as agent for the defendant in error, and defend-"ant in error is liable for any assessments which he

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"might be called upon to pay." This proposition assumes that the defendant was the real owner of the stock, fraudulently covering up that ownership under the name of P. C. Peterson. Under that proposition he cites the cases of *Davis, receiver*, v. *Stevens*, 17 Blatchford, 259; *Case, receiver*, v. *Small*, 10 Fed. Rep. 722; *Hubbell* v. *Houghton*, 86 Fed. Rep., 547 and *Houghton* v. *Hubbell*, 91 Fed. Rep., 453, the same case as above referred to on appeal to the Circuit Court of Appeals. In each of these cases, it appeared as an established fact that the persons sought to be charged as stockholders in national banks were the actual and real owners of the stock, and were covering up their actual ownership under the names of their agents or representatives, and fraudulently attempting to conceal their real ownership. It is unnecessary to examine those cases in order to show the difference between the facts there before the court, and the facts here presented. In those cases the parties, who appeared as registered owners of the stock represented a real ownership. In the present case, Peterson, as trustee, represented the claims of all parties in interest, and the defendant *only as a pledgee*, or the holder of the stock as collateral security, and this the general finding of the trial court conclusively established.

The second point of the brief and argument of plaintiff's counsel, namely: "The shares of stock in controversy are not and never were held by the defendant in error, or P. C. Peterson, as pledgee," is answered by the foregoing statement.

The third point made in the brief of plaintiff's counsel is a positive assertion that "By the exchange of the stock "in the Helena National Bank originally pledged for the "shares of the First National Bank, the defendant in er-

" ror became, for the purposes of this action, the real " owner of the shares so received in exchange."

This, also, is an assumption *against the findings of the trial court*, as to the fact of ownership of the stock—a fact to be determined by an examination of the entire evidence in the case, and which was a matter peculiarly and exclusively within the jurisdiction and control of that court. The reference to section 5139 of the Revised Statutes of the United States does not help out the assumption of counsel, for it simply says that " Every person becoming a shareholder by such transfer, shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares."

A real holding and a real ownership of the shares, and not a mere holding as collateral security, must be regarded as a necessary condition to the effective operation of that provision of the statute.

The cases of the *National Bank* v. *Case*, 99 U. S., 628; *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S., 479, and *Pauly* v. *State Loan & Trust, Company*, 165 U. S., 606, have all been considered in this argument.

The quotation made by the counsel for plaintiff (page 21) from the opinion of the court in the last named case relates solely to cases where there is either an admitted or an established real ownership of the stock in controversy, and he omits entirely the clause of that opinion which applies to the case now before the court, where the question of fact as determined by the finding of the trial court, is that the defendant simply held the stock as pledgee and for purposes of collateral security.

It may not be contended that in the decision of the

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various cases referred to by counsel, this court was not seeking to reach a conclusion as to the real standing of the parties in interest; but it may be fairly said, as the result of the cases, that no conclusion was reached in any of them which would justify a reversal of the judgment in the present case, on the ground that the defendant was the real owner of the 120 shares of stock in the First National Bank of Helena, *contrary to the finding of the trial court.*

The cases referred to by counsel in his brief which concern the powers of assignees under voluntary assignments to exchange and convert into other and different securities or property the assets which they hold as such assignees, are not here pertinent, and especially for the reason, that in all those cases, there were or seemed to have been complete transformations of properties or property rights; that is to say, a substitution of one thing for an entirely distinct and separate thing with which the former had no connection, where the only legitimate power, which the assignee could exercise, was to convert the property as originally received by him into money, and where no discretion was allowed to the assignee to do anything except as authorized by the letter of the assignment made to him, and where he acted solely as a *naked trustee*, without personal interest. In such cases, the law holds the trustee to a very strict accountability, and allows to him no latitude of discretion. The holder of property of a changeable value, as collateral security, is not held to the strict accountability of a naked trustee. The interest which he has in the property, as the holder of it as security, confers upon him the power to deal with it for the protection of his interest as a pledgee, and the law will only hold him accounta-

ble for the exercise of reasonable judgment in the execution of that authority. He may do that in reference to the pledge, which good business judgment for the time, might deem reasonable, *unless otherwise directed by parties ultimately interested as owners of the pledge*, and there is nothing in this record which shows, or tends to show, that in the acts done by the defendant in respect to the stock pledged to it as collateral security, it did not follow the dictates of good judgment for the protection of that pledge. It did exactly, so far as this record shows, what all the absolute owners of stock in the National Bank of Helena did for the benefit and protection of their own personal interests. The simple matter of taking certificates of shares in the consolidated First National Bank of Helena, in place of the certificates for the shares in the Helena National Bank, was not a swapping or an exchange of property or property rights, or a shifting of one thing into another thing. There was a legalized continuity between the two classes of certificates; both represented the same substantial interest, if there was any substantial interest to be represented by either.

The case of *Stewart* v. *Bigler's assignees*, 98 Pa. St., 80, as cited by counsel for plaintiff, has no bearing upon the present case. The question there, as stated by the counsel, was one of damages between the assignee of the pledgor and the pledgee, growing out of an exchange of securities, a question very different in all its features from the one here presented.

I do not deem it necessary to follow the suggestions of counsel in respect to the provisions of the National Banking Act upon the question of consolidation. Such consolidations are a part of the history of the operation of the national banking law.

Consolidations have been effected with the sanction of the Comptroller of the Currency in numerous instances involving large substantial pecuniary interests. The executive officers of the Government and the courts have recognized such consolidations as legitimate. It may be, but the question is unimportant for present purposes, that a single objecting stockholder could prevent such a consolidation by placing himself in opposition to the business judgment of every other stockholder, and putting himself in the position of a blackmailer; and it is possible that the holder of shares in a national bank, simply as collateral security, could put himself in that position and compel all the other stockholders to yield to his blackmailing propositions. The question, so far as it concerns this case, is simply this: Does good judgment, good faith and the exercise of a reasonable discretion, demand of the holder of shares in national banks simply as security, to undertake such a fight with all the real stockholders, *without any suggestion from the real owner* that he is expected or desired to take such a position? I leave the whole question upon this suggestion.

One further remark upon this part of counsel's brief may be pertinent, namely: The defendant is not responsible for the floating condition of the absolute ownership of the stock which it received and held as collateral security. It is sufficient for its protection in this case, that it is not responsible for that condition, but upon the whole record it may safely be said, that Ashby or his assignee have always continued to be the real owners of the shares of stock which the defendant held and holds as collateral security; that Ashby is insolvent, and otherwise disreputable, as the

letters of Edgerton seem to import, and that Mr. Ford, as assignee of Ashby, is probably not liable as a stockholder, is not the fault of the defendant.

The fourth point of counsel's brief and argument (p. 30), is simply a continuation of the assumption that the exchange of the stock of the Helena National Bank into the stock of the consolidated First National Bank of Helena, was a sale of the stock which the defendant held as collateral security. It was conclusively determined against this assumption by the general finding of the trial court, still he proceeds to argue upon that basis, and arraigns the opinion of the Circuit Court of Appeals upon that subject. The whole argument may well be dismissed from consideration by the suggestion, that the opinion of the Circuit Court of appeals is not here legitimately under review, nor is the defendant bound or concluded, in any way, by the reasons which the Circuit Court of Appeals may have given for its conclusions. It would be an innovation upon the practice of Appellate Courts, if errors can now be assigned upon the reasons given by the lower court for its conclusions. It is said to have been amongst the instructions given by Charles II to an appointee to a judicial office in the American colonies, that he should give his conclusions without reasons therefor. All appellate jurisdictions would be inextricably involved in controversies, if the reasons assigned by inferior courts were allowed to be matters of exception and argument. This is not said as indicating any imperfection in the reasoning of the opinion of the Circuit Court of Appeals in this case, but simply as an indication of what is deemed to be the relations of such opinions to the hearing of the cause in the Appellate Court.

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There is a broad distinction between *a liability to damages for the maladministration of a trust and the assumption of the liabilities of an actual stockholder* under the national banking law.

In inviting the attention of the court to Edgerton's letter (Rec., 14–18) counsel is simply asking this court to place itself in the position of a trial court, and review the findings of that court upon the evidence. He makes his own analysis and draws certain conclusions from that letter and apparently reaches a conclusion satisfactory to himself that the consolidation of the two banks was disadvantageous to the interests of the shareholders in the Helena National Bank. He forgets, however, that this letter and all it contained with other evidence was before the trial court and the effect of it presumptively duly considered in the general finding.

It may not be necessary, but is somewhat interesting to follow out the reasoning of counsel from the conclusion he seems to have reached from his analysis of the Edgerton letter. He says (Brief, 29): "Those state-
"ments of the then president of the Helena National
"Bank, being the same person who in May, 1895, re-
"ceived from the defendant in error *its stock* in the
"Helena National, standing as they do as a part of the
"agreed statement of facts undisputed and in no man-
"ner qualified, seems to justify the conclusion that at
"that time the stock was of the value named, and that
"had the defendant in error refused to accept the ex-
"change, it would have received a consideration suf-
"ficient to have liquidated the debt of Ashby.

"It may be said that this is a matter with which we
"have no concern in this case, but when it is considered

" that had such sale of the stock been made, the one " hundred and twenty shares of the stock in the First " National, received by the defendant in error and by its " ' rection placed in the name of P. C. Peterson, on the " ' ›ks of the bank, would have continued the property " ' Edgerton or some of the parties in the consolida- " tion scheme and thus, upon the insolvency of the First " National Bank which followed nine," (it should be *sixteen*), " months later the receiver would not have " been obliged to meet the question here presented and " would not have been required to scour the country to " find an owner of this stock, but would have proceeded " directly to enforce the assessment against Edgerton or " such of his associates as held the particular stock in " controversy, it becomes a question of vital and con- " trolling importance."

All this simply means that if the defendant, holding the stock of the Helena National Bank as collateral security, had in opposition to the judgment of real owners and holders of the stock of that bank, obstinately and without apparent reason and without any suggestion or request so to do from the real owners, constituted itself an obstructionist to the scheme of consolidation and a blackmailer upon the rights of others it might have forced somebody to pay the debt of Ashby, and thereby made that " *somebody* " liable to the receiver of the bank in a proceeding like the present one.

It would seem to be reasonable to assume, that the court would excuse the recital of the numerous contingencies which would surround the possible successful execution of the plan, thus presented in the line of compelling somebody to assume a liability for which, under existing circumstances, there was no *responsible* party. It is,

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perhaps, well understood in the profession, that a defendant who pleads *misnoner* in a civil suit, by way of *abatement*, must furnish in his plea, his right name in order that a better writ may issue. *It has never* been *decided*; that a party sued as defendant and specifically, by plea in bar, denying his own liability, must by subterfuges and against business judgment, provide a party, who should respond to the liability, with which he is charged in the pending proceedings.

If any question as to Peterson's liability could be raised upon this record, for any purpose connected with this case, reference might properly be made to the case of *Turnbull* v. *Payson*, 95 U. S., 418, in which this court, speaking by Mr. Justice CLIFFORD (page 421), says:

"When the name of an individual appears on the "stock book of a corporation as a stockholder, the *pri-* "*ma facie* presumption is that he is the owner of the "stock, in a case where there is nothing to rebut that "presumption; and in an action against him as a stock- "holder, the burden of proving that he is not a stock- "holder, or of rebutting that presumption, is cast upon "the defendant."

That Peterson was not a stockholder in any reasonable interpretation of that term, does not seem to admit of question. He was merely a custodian, depository or stakeholder, a naked trustee for the benefit of all parties in interest.

The case of *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S., 479, and the conclusion arrived at by this court upon a careful review of all the cases in *Pauly* v. *State Loan and Trust Co.*, 165 U. S., 606, 619, hereinbefore referred to, sufficiently answer any suggestion,

which may be made in that direction, for the purpose of this case.

For the reasons presented, it is respectfully submitted, that the judgment of the Circuit Court of Appeals should be affirmed.

JOHN N. JEWETT,
Of Counsel for Defendant in Error.

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Supreme Court of the United States.

No. 67.—October Term, 1901.

E. T. Wilson, Receiver of the First National Bank of Helena, Montana, Plaintiff in Error,
vs.
The Merchants' Loan and Trust Company of Chicago, Illinois.

In error to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 2, 1901.]

Mr. Justice Peckham delivered the opinion of the Court.

The plaintiff in error brings this case here to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, (98 Fed. Rep. 688,) affirming a judgment of the District Court of Illinois in favor of the defendant. The plaintiff in error is the receiver of the First National Bank of Helena, Montana, and brought this action against the defendant to enforce an assessment of 100 per cent ordered by the Comptroller of the Currency on all owners of shares in that bank. In his declaration the plaintiff, after alleging the organization of the bank, his appointment as receiver and the assessment by the Comptroller, averred that "the Merchants' Loan and Trust Company, a corporation, at some time between the first day of December, 1894, and first day of June, 1895, (the exact date being to plaintiff unknown,) purchased and became the owner of 120 shares of the capital stock of said First National Bank of Helena, Montana, of the par value of one hundred dollars each, and continued to be and was at the time said bank suspended and ceased to do business the real owner of the same; but in order to evade the responsibility imposed by law upon the shareholders in said bank caused said shares to be placed on the books of said bank in the name of P. C. Peterson, one of its employees, in whose name said shares appeared on the said books at the time of said failure. And the plaintiff avers that the said Peterson was at the time said stock was issued to him as aforesaid and at the time of the failure of said bank, a person of small means and not responsible financially."

The plaintiff demanded judgment for the sum of $12,000, being $100 on each share of the stock in the bank owned (as alleged) by the defendant.

As one of several defenses to the action, the defendant pleaded that the plaintiff ought not to maintain his action "because it says that it did not,

at any time between the first day of December, 1894, and the first day of June, 1895, or at any other time, purchase or become the owner of one hundred and twenty shares of the capital stock of the said First National Bank of Helena, Montana, or any share or shares of the capital stock of said bank, and of this the said defendant puts itself upon the country," &c.

Under these pleadings the plaintiff, of course, had the burden of proving ownership of the stock by the defendant.

The parties waived a trial by jury and entered into the following stipulation:

"It is hereby stipulated and agreed between the parties herein that trial by jury in this case be waived; that this cause may be submitted to the Honorable Christian C. Kohlsaat, judge of this court, upon the foregoing statement of facts, duly signed by the attorneys of the parties respectively, and that for the purpose of such trial the said statements of facts shall be taken as absolutely true, and shall be taken and considered as all the facts concerning the transactions therein referred to, subject to any and all objections which might properly be urged to the competency or materiality of any part thereof."

Upon the trial before the court, without a jury, the statement of facts as agreed upon between the parties was put in evidence, and such statement contained all the evidence in the case, which was thereupon submitted to the court for its decision. The court made no special findings of facts but made a general finding of the issues for the defendant, embodied in a judgment which was entered as follows:

"Now come the parties by their attorneys, and thereupon a jury is waived by written stipulation, and this cause is submitted to the court for trial, and the court having heard the evidence and arguments of counsel, and being now fully advised, finds the issues for the defendants, to which finding the plaintiff excepts, and thereupon the plaintiff enters his motion for a new trial, which is heard and overruled, to which ruling the plaintiff excepts. It is thereupon considered and adjudged by the court that the defendants recover of the plaintiff their costs in this behalf to be taxed and that execution issue therefor, to which judgment the plaintiff then and there excepts."

The statement of facts agreed upon and filed in the court was subsequently allowed as a bill of exceptions. There was no exception taken to any fact contained in this statement, nor in the progress of the trial, nor was there any request to find other special facts. The only exception taken was to the general finding of the court in favor of the defendant. From this agreed statement of facts it appears that on April 15, 1893, the defendant loaned to one Ashby of Helena, Montana, $12,000, and took his note in the usual form payable on August 16, 1893. As collateral security for the payment of the note at maturity, Ashby signed in blank and delivered to the defendant a certificate representing 150 shares of the capital stock of the Helena National Bank of Helena, Montana. The

note taken for the loan was of the kind usually termed a collateral note, and authorized the sale of the collateral deposited as security therefor upon default in the payment of the note. At the time of the loan Ashby was president of the Helena National Bank. On July 26, 1893, Ashby made a general assignment for the benefit of his creditors, and among the property assigned by him was the certificate for 150 shares of the capital stock of the Helena National Bank, described by the assignor as then held by the Merchants' Loan and Trust Company in pledge. About the date of the assignment Ashby resigned the presidency of the Helena National Bank. In the summer of 1894 the Ashby note still remained unpaid, and the certificate of stock remained in the possession of the defendant, no transfer thereof being made upon the books of the bank. Later in the year 1894 the parties in interest in Helena proposed to consolidate the Helena National Bank with the First National Bank of Helena, and the consent of a sufficient number of shareholders in the bank was obtained before the defendant was asked to consent to the transfer of the shares held by it in pledge, on the same terms upon which the owners of shares in the Helena National Bank had agreed to a consolidation of the two banks, by taking shares in the First National Bank of Helena in exchange for their shares in the Helena National Bank, at the rate of 80 per cent of new shares in exchange for the old. In response to such request the defendant sent the certificates for the 150 shares in the Helena National Bank to the president of that bank. In exchange therefor certificates for 120 shares of stock in the First National Bank of Helena were sent to the defendant, the shares being entered, at request of defendant, on the books of the bank and in the certificates, in the name of P. C. Peterson, an employee of the defendant. Subsequently, the First National Bank of Helena went into the hands of a receiver, who found the 120 shares standing on its books in the name of Peterson. The receiver, after the assessment was made, commenced this action against the defendant trust company, alleging that it was the real owner of the stock, and that it stood in the name of Peterson for the purpose of enabling the defendant to evade liability as owner.

The note remains unpaid, although two small payments on account have been made by the assignee of the maker since the assignment.

It is part of the statement agreed upon that the original shares of stock were placed in defendant's possession simply as a pledge or collateral security for the payment of the note made by Ashby, and the certificates which have been substituted for them, as already mentioned, "have ever since been and now are in the possession and control of the defendant, and are held by it in the same way and for the same purpose as the certificates for one hundred and fifty shares of the capital stock of the Helena National Bank were originally held, except as the conditions may

have been changed by the facts hereinbefore stated, but that neither the defendant nor the said Peterson ever took any part in the management of either of said banks or participated in the administration of their affairs." The "facts hereinbefore stated" consisted not only of those which have been given above, but also of correspondence between the officers of defendant and the officers of the Helena National Bank and the assignee of the pledgor Ashby, which is set out in the agreed statement.

This statement has been referred to for the purpose of understanding the materiality of certain facts not found or agreed upon, the failure to do which prevents our use of the statement in the decision of the case. The contention of the plaintiff herein is that the substitution of the original stock for that of the First National Bank of Helena was made without the consent of the pledgor, and amounted to a conversion of the stock and made the defendant, when it took the shares of stock in the consolidated bank, the owner thereof, and rendered it liable to assessment as such owner, notwithstanding the fact that the stock was entered and remained on the books of the bank and in the certificate issued by the bank, in the name of Peterson, as owner.

Aside from the question whether the defendant had or had not the right as pledgee of the stock in the Helena National Bank to cause the same to be transferred into shares of the other bank after a majority of the stockholders had consented to a consolidation, it would seem that if Ashby, the owner, had himself consented to the arrangement, or subsequently ratified it, the substituted stock would remain under the same terms and conditions as attached to the original stock, and it would be simply a pledge to and not an ownership of stock by the defendant, and as the stock never stood in the name of the defendant, the case would be governed by that of *Pauly* v. *State Loan & Trust Company*, (165 U. S. 606,) and the cases there cited, and *Jackson* v. *Emmons*, (176 U. S. 532.)

The difficulty we meet, which prevents the decision of the case from resting on the statement of facts, lies in the omission therefrom of any finding or agreement upon the question of fact whether the pledgor had or had not consented to the change, and instead of any such finding or agreement there is placed in the statement certain correspondence from which, together with other facts stated, an inference of consent or perhaps ratification might be drawn, but is not found or agreed upon, thus leaving the ultimate fact of consent or non-consent a matter of inference, and an inference of fact and not of law, and this is a material fact arising upon the statement as agreed upon.

Neither is there any finding upon the question of the consent of the assignee of the pledgor, to the substitution of the stock, or upon the question of ratification by him. There are facts from which the consent or

ratification might be inferred, or the contrary, but there is no finding of any ultimate fact regarding the matter.

The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court, (R. S. secs. 649, 700,) is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.

As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held that upon a trial by the court, if special findings are made, they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties, and if the finding of facts be general, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by a bill of exceptions, and in such case the bill cannot be used to bring up the whole testimony for review any more than in a trial by jury. (*Norris* v. *Jackson*, 9 Wall. 125.)

In this case the finding is general, and, strictly construing the statute, the only questions which would be reviewable would be those questions which arose during the progress of the trial, and which were presented by bill of exceptions. It has, however, been held that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. (*Supervisors* v. *Kennicott*, 103 U. S. 554.) But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts and the statement must not merely present evidence from which such facts or any of them may be inferred.

An exception to a general finding of the court on a trial without a jury brings up no question for review. The finding is conclusive, and there must be exceptions taken to the rulings of the court during the trial in order to permit a review thereof. (*Insurance Company* v. *Folsom*, 18 Wall. 237.)

In *Martinton* v. *Fairbanks*, (112 U. S. 670,) which was a trial before the judge without the intervention of a jury and where there was only a general finding of facts and a judgment for the plaintiff below, the court decided that an exception to the general finding of the court for the plain-

tiff upon the evidence adduced at the trial presented no question of law which the court could review. In that case there was no agreed statement of facts.

Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts together with certain other facts evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute.

In *Raimond* v. *Terre Bonne Parish*, (132 U. S. 192,) it was said that the agreed statement of facts by the parties or a finding of facts by the Circuit Court must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts or from which they may be inferred.

In *Glenn* v. *Fant*, (134 U. S. 398,) there was a stipulation that the case should be heard upon an agreed statement of facts annexed, with leave to refer to exhibits filed therewith. It was held that the stipulation could not be regarded as taking the place of a special verdict or of a special finding of facts, and that the court had no jurisdiction to determine the question of law arising thereon.

It is true there was no bill of exceptions in that case, but the bill in this case presents no exception taken during the progress of the trial, and only contains an exception to the conclusion of the trial court in ordering judgment upon the issues in favor of the defendant.

Lehnen v. *Dickson*, (148 U. S. 71,) decided that any mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, could not be deemed a special finding of facts within the scope of the statute; and if there were a general finding and no agreed statement of facts, the court must accept that finding as conclusive and limit its inquiry to the sufficiency of the complaint and to the rulings, if any be preserved on questions of law arising during the trial. The court, in the opinion written by Mr. Justice Brewer, said:

"But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

In *St. Louis* v. *Telegraph Company*, (166 U. S. 388,) it was held that the special finding of facts referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts, upon which the law must determine the rights of the parties, and if the finding of facts be general, only such rulings made in the progress of the trial can be reviewed as are presented by a bill of exceptions, and in such case the bill cannot be used to bring up the whole testimony for review any more than in a trial by jury.

We now hold, in accordance with the authorities, that an agreed statement of facts which is so defective as to present, in addition to certain ultimate facts, other and evidential facts upon which a material ultimate fact might have been but which was not agreed upon or found, cannot be regarded even as a substantial compliance with the statute. Being concluded by the general finding of the issues in favor of defendant, there is no error in the record, and the judgment must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.